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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 24

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, UNITED STATES VETERANS' ADMINISTRATION, PETITIONER

vs.

JAMES J. LOWREY, COMMITTEE OF THE PERSON AND ESTATE OF WILLIAM GARMES, AN INCOMPETENT PERSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED APRIL 11, 1938
CERTIORARI GRANTED MAY 23, 1938

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX

1 In Supreme Court of New York, Appellate Division—
Second Department

IN THE MATTER OF THE APPLICATION OF JAMES J. LOWREY, COMMITTEE OF THE PERSON AND PROPERTY OF WILLIAM GARMES, INCOMPETENT, FOR AN ORDER AUTHORIZING HIM TO PAY A FEE TO COUNSEL FOR LEGAL SERVICES RENDERED THE ESTATE.

VETERANS' ADMINISTRATION, APPELLANT
JAMES J. LOWREY, RESPONDENT

Statement under rule 234

This proceeding was commenced by the filing of an application for an order authorizing James J. Lowrey, as committee of William Garmes, an incompetent person, to pay to James J. Richman, Esq., a fee for legal services rendered to the estate in the matter of the reinstatement of war risk insurance.

Affidavits in opposition thereto were submitted by Abraham Schwartz, attorney for the Veterans' Administration and the matter was referred, by an order of Mr. Justice Kadien, dated December 18, 1936, to an Official Referee to take testimony and report with his opinion as to the services rendered by James J. Richman, Esq., and the value of such services.

2 A hearing before the Honorable James C. Van Siclen, Official Referee, was held on January 4, 1937, and on January 6, 1937, said Official Referee reported that the services rendered by James J. Richman, Esq., in connection with the war risk insurance contract in the sum of $10,000 issued by the U. S. Government to William Garmes, incompetent, are of the reasonable value of $1,500.

On January 12, 1937, James J. Lowrey, Esq., moved the court for an order modifying the report of the Official Referee dated January 6, 1937, so as to increase the fee allowed from $1,500 to $3,000.

An affidavit in opposition to said motion was submitted by Abraham Schwartz for the Veterans' Administration.

On February 8, 1937, an order was granted by the Honorable Mr. Justice Thomas C. Kadien, and entered in the office of the Clerk of the County of Kings on February 9, 1937, confirming the report of the Official Referee dated January 6, 1937, and directing James J. Lowrey, committee of William Garmes, incompetent, to pay to James J. Richman, Esq., out of the estate of the incompetent, the sum of $1,500 as and for his legal services.

The appellant was represented by James A. Clark, attorney for the Administrator of Veterans' Affairs (Abraham Schwartz, of counsel).

The respondent was represented by James J. Richman, Esq. (Benjamin C. Ribman, Esq., of counsel).

There has been no change of parties or attorneys since the commencement of the within proceeding.

3 In Supreme Court of New York, Kings County

IN THE MATTER OF THE APPLICATION OF JAMES J. LOWREY, COMMITTEE OF THE PERSON AND PROPERTY OF WILLIAM GARMES, INCOMPETENT, FOR AN ORDER AUTHORIZING HIM TO PAY A FEE TO COUNSEL FOR LEGAL SERVICES RENDERED THE ESTATE

Notice of appeal to appellate division

SIRS: Please take notice that the Veterans' Administration herein appeals to the Appellate Division of the Supreme Court, Second Department, under authority of Article 81-A, Section 1384-T of the Civil Practice Act, from an order of this court made and entered in the office of the Clerk of the Supreme Court, Kings County, on the 9th day of February 1937, confirming the report of the Honorable James C. Van Siclen, dated January 7, 1937, awarding to James J. Richman, Esq., the sum of $1,500 and directing that such sum be paid by James J. Lowrey, committee of the person and property of William Garmes, the incompetent person herein, and from each and every part of said order.

Dated, New York, N. Y., February 16, 1937.

Yours, etc.,

JAMES A. CLARK,
Chief Attorney,
Veterans' Administration, Office & P. O. Address, 341 Ninth Avenue, Borough of Manhattan, City of New York.

4 To CLERK, *Supreme Court, Kings County.*

JAMES J. RICHMAN, ESQ.,
130 Clinton Street,
Brooklyn, New York.

In Supreme Court of New York, County of Kings

Order appealed from Feb. 8, 1937

A petition verified July 3, 1936, having been filed by James J. Lowrey, Committee of the Person and Property of William Garmes, an Incompetent Veteran, for an order authorizing the Committee to pay a reasonable fee to James J. Richman, Esq. for certain legal services rendered by the said James J. Richman, Esq. to the Estate of William Garmes, Incompetent, and described in said petition and the said petition having regularly and duly come on to be heard before the undersigned at a Special Term, Part VI of this

5 Court on August 17, 1936, and due deliberation having been had and this Court having thereafter duly made an order dated and entered herein on December 18, 1936 reciting the proceedings theretofore had in respect of said petition and motion and the

papers and exhibits filed and read in connection therewith, pursuant to which order there was referred to an Official Referee the matter of taking testimony and reporting with his opinion as to the services rendered by the said James J. Richman, Esq., and the reasonable value of such services,

And the said matter so referred having thereafter duly come on to be heard on January 4, 1937, before the Hon. James C. Van Siclen, an Official Referee of this Court, and said Referee having duly heard the allegations and proofs of the parties, and the said Referee having thereafter duly made and rendered his report in writing dated January 6, 1937, in conformity with the said order of December 18, 1936, as to the services rendered by the said James J. Richman, Esq., and the reasonable value thereof which said Referee recommended be fixed in the sum of $1,500.00,

And an application having thereafter been made to modify or confirm said report of said Referee by notice of motion dated January 6, 1937, hereafter referred to, and said motion having duly come on to be heard before Mr. Justice Brower at Special Term, Part VI of this Court, and Mr. Justice Brower after being advised by counsel for the parties of the proceedings theretofore had, and having thereupon duly referred the said motion to the undersigned and the said motion having duly come on to be heard before the undersigned,

6 Now, on reading all the papers and proceedings, herein, and mentioned in said order of reference dated December 18, 1936, and on reading and filing said notice of motion dated January 6, 1937, and proof of due service thereof, and on reading and filing the above mentioned report of the said Referee, and the minutes of the testimony taken and the exhibits received in evidence before the said Referee, all submitted in support of said motion to modify or confirm said report, and on reading and filing the affidavit of Abraham Schwartz sworn to January 11, 1937, and the exhibits A and B annexed thereto, all submitted in opposition to said motion, and after hearing James J. Richman, Esq., by Benjamin C. Ribman, Esq., of counsel, in support of said motion, and James A. Clark, Esq., attorney for the Veterans' Administration, by Abraham Schwartz, Esq., in opposition thereto, and due deliberation having been had, it is,

Ordered, adjudged, and decreed that said report dated January 6, 1937, made by the Hon. James C. Van Siclen, Official Referee, be and the same hereby is, in all respects approved and confirmed, and it is further

Ordered, adjudged, and decreed that the fair and reasonable value of the legal services rendered by James J. Richman, Esq., to the Estate of William Garmes, Incompetent, in connection with the matters referred to in said petition verified July 3, 1936, be and the same hereby is fixed at the sum of Fifteen Hundred ($1,500.00) Dollars, and it is further,

Ordered, adjudged, and decreed that James J. Lowrey, Committee of the Person and Property of William Garmes, Incompetent, be and he hereby is directed to pay to James J. Richman, Esq., out of the assets of the Estate of William Garmes, Incompetent, the sum of Fifteen Hundred ($1,500.00) Dollars as and for his said legal services.

Enter,

T. C. K., Jr., *J. S. C.*

Granted Feb. 8, 1937.

JOHN N. HARMAN, *Clerk.*

In Supreme Court of New York, County of Kings

Notice of motion for order modifying report of referee

SIR: Please take notice that upon the order dated December 18th, 1936, made by Mr. Justice Kadien, and report dated January 6th, 1937, made by the Honorable James C. Van Siclen, Official Referee, and upon all the proceedings heretofore had herein, the undersigned will move this Court, at a Special Term, Part 6 thereof, to be held in and for the County of Kings, in the Borough of Brooklyn, City and State of New York, on the 12th day of January 1937, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order modifying the report dated January 6th, 1937, made by the Honorable James C. Van Siclen, Official Referee, so as to increase the fee alloyed to James J. Richman, Esq., from Fifteen Hundred ($1,500.00) Dollars to Three Thousand ($3,000.00) Dollars, or in the alternative to confirm the said report as submitted, without prejudice to the right of James J. Richman, Esq., to appeal from any order entered herein on the ground that the fee allowed to him is inadequate, and for such other and further relief as to this Court may seem just and proper.

Dated Brooklyn, N. Y., January 6th, 1937.

Yours, etc.,

JAMES J. RICHMAN,
Attorney for Petitioner-Committee, Office & P. O. Address, 130 Clinton Street, Borough of Brooklyn, City of New York.

To:

JAMES A. CLARK, ESQ.,
Attorney for Veterans' Administration, 341 Ninth Avenue, New York City.

In Supreme Court of New York, County of Kings

Order of reference to official referee, Dec. 18, 1936

A petition having been filed by James J. Lowrey, Committee of the Person and Property of William Garmes, Incompetent, for an

order authorizing him to pay a reasonable fee to James J. Richman, attorney, for legal services rendered to the Estate, and said petition having regularly come on to be heard on the 17th day of August 1936,

Now, on reading and filing the notice of motion dated August 1st, 1936, the petition of James J. Lowrey, verified July 3rd, 1936, the affidavit of James J. Richman, sworn to July 3rd, 1936, the affidavit of Benjamin C. Ribman, sworn to August 5th, 1936, and Exhibits A, B, C, D, E, F, G, H, I, and J annexed thereto, the answering affidavit of the Veterans' Administration, by Abraham Schwartz, sworn to August 12th, 1936, and Exhibits A, B, and C annexed thereto, the reply affidavit by James J. Richman,
10 sworn to August 15th, 1936, the reply affidavit by James J. Lowrey, sworn to August 14th, 1936, the second answering affidavit of the Veterans' Administration, by Abraham Schwartz, sworn to August 18th, 1936, the second reply affidavit by James J. Richman, sworn to August 20th, 1936, the third answering affidavit of the Veterans' Administration by Abraham Schwartz, sworn to August 20th, 1936, and

After hearing James J. Richman, by Benjamin C. Ribman, attorney for the petitioner, in support of the petition, and James A. Clark, by Abraham Schwartz, attorney for the Veterans' Administration, in opposition thereto, and an opinion having been rendered December 10th, 1936, it is

Ordered, that this matter be and the same hereby is referred to an Official Referee to take testimony and report with his opinion as to the services rendered herein by James J. Richman, Esq. and the value of such services.

Enter,

T. C. K., Jr., *J. S. C.*

Granted: 12–18–36.

JOHN N. HARMAN, *Clerk.*

11 In Supreme Court of New York, Kings County

Notice of motion, referred to in order of reference

SIR: Please take notice that upon the petition of James J. Lowrey, verified the 3rd day of July 1936, the affidavit of James J. Richman, sworn to the 3rd day of July 1936, the affidavit of Benjamin C. Ribman, sworn to the 5th day of August 1936 and upon Exhibits A, B, C, D, E, F, G, H, I, and J, annexed hereto, and upon all of the proceedings had herein, the undersigned will move this Court at Special Term, Part VI thereof appointed to be held in and for the County of Kings, in the Borough of Brooklyn, City of New York on the 17th day of August 1936 at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order authorizing the Committee to pay a fee for legal services

rendered to the estate, and for such other further and different relief as to the court may seem just and proper, and

Please take further notice that answering affidavits must be served on the attorney for the petitioner at least five (5) days before August 17th, 1936, the return day, pursuant to rule 64 of the rules of Civil Practice.

12 Dated Brooklyn, New York, August 1st, 1936.

Yours, etc.,

JAMES J. RICHMAN,
Attorney for Petitioner, Office & P. O. Address, 130 Clinton Street, Brooklyn, New York.

To:

JAMES A. CLARK, ESQ.,
Attorney for Veterans' Administration,
341 Ninth Avenue, New York City.

In Supreme Court of New York, Kings County

Petition of James J. Lowrey, referred to in order of reference

To the Supreme Court of the State of New York, County of Kings:

The petition of James J. Lowrey shows to this Court as follows:

1. The Petitioner is the Half Brother and Committee of the Person and Property of the Incompetent and the sole next of kin.

2. This is a petition for an order authorizing and permit-

13 ting Petitioner, as Committee, to pay to Counsel, a reasonable fee as compensation for legal services rendered by Counsel to the Estate which resulted in the enrichment of the Estate in the immediate sum of $10,235.00 and a potential sum of $16,905.00 based on the life expectancy of the Incompetent, making a total approximate enrichment of the Estate in the sum of $27,140.00. The enrichment of the Estate as aforesaid was brought about as a result of proceedings instituted by Petitioner to recover upon a claim arising out of a war risk insurance contract in the sum of $10,000.00 established herein, which had been issued by the United States Government to the Incompetent, A World War Veteran, and which had lapsed by reason of nonpayment of premium due May 1, 1920.

3. On or about April 1934, Petitioner, as Committee, retained James J. Richman, Counsel for the Estate, to prepare his annual account, as Committee, and in the course of the conversations Counsel questioned Petitioner concerning the status of the Incompetent's war risk insurance. The Petitioner advised Counsel that the policy had lapsed by reason of the non-payment of premium shortly after Incompetent's discharge from the service. Counsel suggested that Insured might have rights under said contract of insurance with result that Petitioner retained Counsel to institute the necessary proceedings to protect whatever rights the Incompetent had under the said contract of insurance.

4. The Petitioner and Counsel held numerous conferences during which a careful analysis was made of the entire life history of
14 Incompetent prior to his enlistment in service, during his service, and subsequent to his discharge from service, all of which required a careful and painstaking examination of the voluminous records relating to the Estate in Petitioner's possession.

5. At the request of Petitioner, Counsel addressed a communication to the Director of Insurance, Veterans' Administration, Washington, D. C., and under date of April 19, 1934, Petitioner receiver a reply thereto which read in part as follows:

"In accordance with the Act of March 20, 1933, and the Amendments thereto insurance benefits are not payable in this instance and cannot be considered by the Administration at the present time." (Exhibit A.)

Under date of April 27, 1934, the Director of Insurance advised Counsel as follows:

"Under public No. 2, 73rd Congress this Administration has no authority to give consideration to any claim on war risk term insurance. It will therefore not be possible for this administration to now consider a claim for insurance benefits on war risk term insurance."

6. Despite these denials by the Veterans' Administration, Counsel prepared claim (Exhibit B) for disability benefits under the said contract of insurance, which claim Petitioner executed, as Committee. Counsel filed the said claim together with supporting affidavits
15 sworn to by Petitioner, with the Director of Insurance, Veterans' Administration, Washington, D. C.

7. Thereafter Counsel appeared before the Insurance Claims Council of the Veterans' Administration, Washington, D. C., and argued the claim with the result that on or about December 30, 1934, Petitioner received a check in the sum of $10,235.00 from the United States Government and has been in receipt of a check in the sum of $57.50 each and every month since said date, and will continue to receive sum of $57.50 per month as long as Incompetent lives and is permanently and totally disabled.

8. Petitioner has carefully read the affidavit of James J. Richman, Counsel, sworn to this 3rd day of July, 1936, annexed hereto and affirms its correctness in every respect.

9. Petitioner desires to emphasize the fact that except for the alertness, untiring vigilance and and sustained efforts of Counsel, these insurance benefits would never have been paid.

10. The assets of the Estate consist of cash in the sum of $10,000.00, Real Estate Securities in the sum of $4,500.00 and Government Bonds in the sum of $4,500.00 making a total of $19,000.00

11. The annual income of the Estate consists of $1,200.00 representing compensation at the rate of $100.00 per month payable by the United States Government; $690.00 per year representing insurance disability benefits at the rate of $57.50 per month under the terms of a war risk insurance contract; $400.00 representing interest

16 at the rate of 2 (2%) per cent on assets in the approximate sum of $20,000.00 making a total income of $2,290.00 per year of which Petitioner, as Committee, is allowed $1,200.00 per year at the rate of $100.00 per month for the support, maintenance, clothing, spending money and incidentals of the Incompetent.

12. In view of the substantial service rendered by Counsel and the results attained Petitioner respectfully asks this Court for an order fixing a reasonable sum as a fee to be paid Counsel for the services which said Counsel rendered herein.

Wherefore, Petitioner respectfully asks that the within application be granted.

Dated the 3rd day of July 1936.

JAMES J. LOWREY.

(Verified by James J. Lowrey, on the 3rd day of July 1936.)

In Supreme Court of New York, Kings County

Affidavit of James J. Richman, referred to in order of reference

STATE OF NEW YORK,
City of New York, County of Kings, ss:

James J. Richman, being duly sworn, deposes and says:

17 1. Deponent is an attorney and counsellor at law duly admitted to practice in the State of New York, and maintains an office at 130 Clinton Street, Borough of Brooklyn, City of New York.

2. This affidavit is being submitted by Deponent in order to enable the Court to fix a reasonable fee as compensation for legal services rendered by Deponent to the Estate in the immediate sum of $10,235.00 and potential sum of $16,905.00 based on the life expectancy of the Incompetent, making a total approximate enrichment of $27,140.00, by reason of proceedings instituted on behalf and at the request of the Committee in connection with a claim under a war risk insurance contract in the sum of $10,000.00 issued by the United States Government to the Incompetent which had lapsed by reason of non-payment of premium due May 1st, 1920.

3. The successful termination of this matter involved an enormous amount of work on the part of Deponent.

4. Deponent wrote the Veterans' Administration, Washington, D. C. requesting information concerning the insurance and the Director of Insurance under date of April 19, 1934 advised the Committee as follows:

"The above named veteran when in the military service applied for $10,000 war risk term insurance, which he permitted to lapse owing to the non-payment of premium due May 1, 1920. In accordance

18 with the Act of March 20, 1936, and the amendments thereto, insurance benefits are not payable in this instance and cannot

be considered by this Administration at the present time." (Exhibit A.)

Under date of April 27, 1934 the Director of Insurance further advised Deponent as follows:

"Under public No. 2, 73d Congress this Administration has no authority to give consideration to any claim on war risk term insurance. It will therefore not be possible for this administration to now consider a claim for insurance benefits on war risk term insurance."

5. It became necessary for Deponent to make an exhaustive study of all Federal Legislation affecting Government insurance, from October 6, 1917 to date, which, in itself, was a colossal task. The job of determining the contract was unusually difficult because no policy was ever issued to the Incompetent and the contract was not set forth in any one document. On July 26, 1918, the effective date of the insurance, the Insured was informed that his life was insured against death and permanent total disability and later by regulation permanent total disability was defined. The following Statutes were very carefully examined.

Public No. 90, 65th Cong., approved October 6, 1917, amendment to war risk insurance act.

Public No. 242, 68th Cong., approved June 7, 1924, World War veterans act of 1924.

Public 628, 68th Cong., approved Mar. 4, 1925, World War veterans act of 1925.

19 Public No. 522, 71st Cong., approved July 3, 1930, World War veterans act of 1930.

Public No. 2, 73rd Cong., approved Mar. 20, 1933 (Economy Act).

Public No. 78, 73rd Cong., approved June 16, 1933.

Public No. 141, 73rd Cong., approved Mar. 27-28, 1934.

6. With the contract pieced together a careful study was made of all decisions affecting war risk insurance, especially the decisions in the following cases, which related specifically to Dementia Praecox, the disease from which the Incompetent is suffering:

Kelley v. U. S., 49 F. (2d) 987 (C. C. A. 1) May 1931;

Poole v. U. S., 65 F. (2d) 795 (C. C. A. 4) June 1933;

Cox v. U. S., 24 F. (2d) 944 (C. C. A. 5) March 1928;

Jones v. U. S., 55 F. (2d) 574 (C. C. A. 5) January 1932;

Cunningham v. U. S., 67 F. (2d) 714 (C. C. A. 5) November 1933;

Scott v. U. S., 50 F. (2d) 773 (C. C. A. 6) June 1931;

Asher v. U. S., 63 F. (2d) 20 (C. C. A. 8) January 1933;

Roberts v. U. S., 62 F. (2d) 594 (C. C. A. 10) November 1932;

Cochran v. U. S., 63 F. (2d) 61 (C. C. A. 10) January 1933;

Atkins v. U. S., 70 F. (2d) 768 (App. D. C.) April 1934;

20 Adams v. U. S., 70 F. (2d) 486 (C. C. A. 10), April 1934;

Johnson v. U. S., 72 F. (2d) 614 (C. C. A. 8), September 1934;

Gwin v. U. S., 68 F. (2d) 124 (C. C. A. 6), December 1933.

7. An exhaustive analysis was made of the medical, social, economic, and compensation history of the Incompetent, from the date of his discharge from the service, to date, based on the records relating to the Incompetent in the Veterans' Administration folder, the papers relating to the Estate on file in the Office of the Clerk of the County of Kings, the voluminous records relating to the Estate in the possession of the Committee and information elicited from the Committee during numerous conferences had with the Committee relating to the history of the Incompetent.

8. A claim (Exhibit B) was prepared, together with a brief (Exhibit C), and Supplemental Brief (Exhibit D), and supporting affidavits (Exhibits E, F, and G), all of which were filed with the Veterans' Administration, Washington, D. C.

9. Deponent retained the services of Dr. William Schick, a Psychiatrist and Neurologist, on the staffs of the Neurological Institute, Montefiore and Beth Israel Hospital and the College of Physicians and Surgeons, Columbia University. Consultations were had with Dr. Schick concerning the Incompetent's condition, and an opinion was thereafter rendered by him that the Incompetent was permamently and totally disabled on April 25, 1920, as defined by the war risk insurance contract. (Exhibit H.)

21 10. The claim was set down for a hearing before the Insurance Claims Council of the Veterans' Administration, Washington, D. C., and Deponent appeared before the Council consisting of Mr. M. Mills, Chairman, Dr. H. M. Chaney, and Dr. E. H. Cooper and argued the claim.

11. The Insurance Claims Council rendered a decision dated October 31, 1934, signed by M. Mills, Legal Member, H. M. Chaney, Medical Member, Dr. Edward A. Leonard, N. P. Consultant and H. H. Milks, Chief of the Insurance Claims Council, which decision reads in part as follows:

"The evidence is clear and convincing that from the time claimed, March 29, 1920, he has been so impaired in mind and body as to render him incapable of any sustained mental effort or physical endeavor. There is no evidence of record that tends to show that he has been gainfully engaged since his discharge from the service." (Exhibit I.)

Thereafter, the Treasurer of the United States paid to the Committee the sum of $10,235.00 representing insurance disability benefits from March 29, 1920, to December 29, 1934, being 178 months at the rate of $57.50 per month, and will continue to pay $57.50 per month to the Committee for the remainder of the Incompetent's life so long as he remains permanently and totally disabled.

12. The report of Thomas O'Rourke Gallagher, Referee in Incompetency, dated May 28, 1935, at pages 6 and 7, reads as follows:

"* * * Committee made application for payments under
22 this policy. This application was denied on the ground that

the policy lapsed for non-payment of premiums and due to the enactment of the Economy Bill, could not be reinstated, and payments could not be made. Committee retained Council in this matter, the above named Mr. Richman, and through his efforts payments were not only resumed under this policy, but back payments made from March 29, 1920, at the rate of $57.50 per month, a total during this period of $10,235.00,"

and further at page 8:

"which (Insurance) in all probability this Estate would have never received except for the efforts of Committee and Counsel * * *"

13. Annexed hereto and marked Exhibit J is a copy of Deponent's Register Sheet relating to the services rendered by Deponent to the Estate in connection with insurance claim from which it appears that no less than two hundred (200) hours were consumed in the preparation, and successful presentation of this claim.

14. In view of the services rendered by Deponent to the Estate at the request and on behalf of the Committee and the results attained, it is the considered judgment of Deponent that an allowance by the Court of Three thousand ($3,000) Dollars as a fee for the legal services rendered herein would be fair, just and reasonable.

JAMES J. RICHMAN.

Sworn to before me this 3rd day of July 1936.

HENRY HALPERN,
Notary Public, Kings County.

Commission Expires March 30, 1938.

23 In Supreme Court of New York, Kings County

Affidavit of Benjamin C. Ribman, referred to in order of reference

STATE OF NEW YORK,
County of New York, ss:

Benjamin C. Ribman, being duly sworn, deposes and says:

1. I am an attorney and counsellor-at-law, having been admitted to practice in the State of New York in the year 1909 and maintain an office at 170 Broadway, in the Borough of Manhattan, City of New York.

2. This affidavit is being submitted in connection with a notice of motion dated August 1st, 1936, by James J. Lowrey, Committee of the Person and Property of William Garmes, Incompetent, for an order authorizing the Committee to pay to James J. Richman, his counsel, a fee of $3,000 for legal services rendered by him to the estate which resulted in the enrichment of the estate in a sum in excess of $27,000.

3. I have known James J. Richman for the past 12 years, during 4 years of which he was in my employ.

4. I know him to be conscientious, diligent, efficient and a sound student of the law.

5. I have read the petition of James J. Lowrey, verified
24 the 3rd day of July 1936, the affidavit of James J. Richman, sworn to the 3rd day of July 1936 and have carefully examined Exhibits A, B, C, D, E, F, G, H, I, and J, annexed to the petition.

6. I am in complete agreement with the finding of the Hon. Thomas O'Rourke Gallagher, Referee in Incompetency, which appears on page 8 of his report dated May 28th, 1935, and which reads as follows:

"which (Insurance) in all probability this Estate would have never received except for the efforts of Committee and Counsel * * *"

7. After reading the papers and exhibits above referred to, and upon my experience of over 27 years of active practice at the Bar, I have no hesitancy in stating to this Court that it is my professional opinion that the services rendered by James J. Richman to the Estate which resulted in the enrichment of the Estate in a sum in excess of $27,000, are reasonably worth more than $3,000. I have so advised Mr. Richman, but he declines to ask for any more than said sum.

BENJAMIN C. RIBMAN.

Sworn to before me this 5th day of August 1936.

RALPH GOLDBERG,
Commissioner of Deeds, N. Y. City.

N. Y. Co. Clk's No. 107, Reg. No. 38G7. Kings Co. Clk's No. 28, Reg. No. 7020. Commission Expires April 23, 1937.

25 *Exhibit A, referred to in order of reference*

VETERANS' ADMINISTRATION,
Washington, April 19, 1934.

Garmes, William—C 405 970

Mr. JAMES J. LOWREY,
197 Leonard Street, Brooklyn, New York.

DEAR SIR: A letter has been received from James J. Richman, Attorney at law, 1482 Broadway, New York, New York, requesting the following information in connection with this case.

1. Whether an insurance policy was ever issued by the United States Government to the above named incompetent, and in what amount.

2. The date when the policy lapsed.

The above named veteran when in the military service applied for $10,000 war risk term insurance, which he permitted to lapse owing to the non-payment of premium due May 1, 1920. In ac-

cordance with the Act of March 20, 1933, and the amendments thereto, insurance benefits are not payable in this instance and cannot be considered by this Administration at the present time.

The above information has not been furnished by this office to Mr. Richman, but it is your privilege to furnish him the same if you so desire.

Respectfully yours,

H. L. McCoy,
Director of Insurance.

Exhibit B, referred to in order of reference

Veterans' Administration Insurance Form 587—Rev. Feb. 1934.
Claim Number 405 970 C—

Statement of Claim for Insurance—Total Permanent Disability

This form is to be executed by the insured if living and competent, or by the committee or guardian if insured is incompetent; if insured is dead, by the personal representative of the estate, or if there is no personal representative the statement of claim must be executed by the beneficiary under the insurance contract.

PART I

1. Name of Insured (First) (Middle) (Last); William Garmes (Incompetent).
2. File Number: 3 046 122.
3. Home Address (Street & No.) (Post Office) (State): 197 Leonard Street, Brooklyn, N. Y.
4. Mailing Address: 197 Leonard Street, Brooklyn, N. Y.
5. Did Insured apply for (a) disability compensation? Yes (b) Disability allowance? ------ (c) Retirement pay? ------ (d) Pension? ------
6. Make (x) after branch of service in which insured served. Army X Navy Marine Corps Coast Guard.
7. Serial Number: ------
8. Date of last enlistment: July 24, 1918.
9. Date of last discharge: April 25, 1920.
10. Date on which the alleged total and permanent disability began. In the World War.
11. Give a complete statement of insured's disability. Dementia Praecox, pronounced incompetent and insane.
12. Places and dates of residence of insured since the date on which the alleged total and permanent disability began. Street and Number or R. F. D., 84 South 6th Street. Post Office: Brooklyn. State: N. Y. Date: ------ Street and Number or R. F. D.: N. 7th Street. Post Office: Brooklyn. State: N. Y. Street and Number

or R. F. D.: 197 Leonard Street. Post Office: Brooklyn. State: N. Y.

13. Name and addresses of hospitals at which the insured has been treated. Name: Kings County, Kings Park State. Address: ------- Date of Admission: 4-29-20. Date of release: 6-13-20.

14. Give names and addresses of all physicians who have attended insured since the alleged total and permanent disability began: Dr. Slinko, Tompkins Avenue, Brooklyn, N. Y.

15. Does or did insured have other insurance? If so, please give—Name of Company: ------- Amount: ------- Date of Issue: ------- Disability payments: -------

28 16. Industrial history. State below occupations since the date on which the alleged permanent and total disability began, and for two years prior thereto, including names and addresses of all employers, beginning and ending dates of employment, usual number of hours worked each day, number of days worked each week, average weekly wages, amount of time lost on account of illness, reason for termination of employment. If self-employed, give period, volume of business, help employed, gross and net income, time lost on account of physical condition. If unemployed, state periods and reasons. Statement should account for the entire period since date of alleged permanent and total disability, and for two years prior thereto. No.

17. If person executing claim is the legal representative of the insured or the personal representative of his estate, give date and designation of court of appointment.

18. I consent that any physician or surgeon who has treated or examined me for any purpose, or whom I have consulted professionally, any insurance company or organization to which I have applied for insurance, or any person, persons, firm, or corporation to whom, or to which I have applied for employment, may divulge to the Veterans' Administration or testify as to, or produce in Court, any information obtained by them, or it, concerning myself by reason of the foregoing, and waive any privilege which renders such information confidential.

OATH OF APPLICANT

19. I, the undersigned, being duly sworn depose and say that each question has been truthfully and completely answered to the
29 best of my knowledge, information, and belief, and I hereby make claim for payment of disability benefits under the contract of insurance.

JAMES J. LOWREY, *Guardian.*

20. Subscribed and sworn to before me this 21 day of April 1934 by James J. Lowrey to me personally known, and to whom the statements herein were fully made known and explained.

HATTIE GOLD, *Notary Public.*

Exhibit C, referred to in order of reference

Veterans' Administration Insurance Claims Council, C 405970, T 3046122.

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, an Incompetent, for permanent and total disability benefits pursuant to the provisions of a yearly renewable term insurance policy in the sum of $10,000 issued by the United States Government.

BRIEF OF INSURED

STATEMENT

This is an application by James J. Lowrey as Committee
30 of the Person and Property of William Garmes, an Incompetent, the Insured herein, for permanent and total disability benefits of $57.50 per month from the 29th day of March 1920 pursuant to the provisions of a yearly renewable term insurance policy in the sum of $10,000 issued by the United States Government, to the Insured herein which provides in part as follows:

"Total permanent disability as referred to herein is an impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

PERTINENT INSURANCE DATES

7/24/18—Enlisted.
7/26/18—Effective date of insurance.
4/25/20—Discharged.
6/1/20—Insurance lapsed by reason of non-payment of premium due May 1, 1920.

POINT ONE

The insured was permanently and totally disabled for insurance purposes while the policy was still in force.

While the policy was in force prior to June 1, 1920, the history of the Insured was as follows:

3/29/20—The Board of Medical Officers issued a report reading as follows:

31 "Dementia Praecox, simple type, characterized by ideas of persecution and of reference, inadequate reaction to environment, silly inconsequential laughter, emotional deterioration * * *. Disability is regarded as permanent. Soldier cannot be discharged from service without danger to himself or others. If discharged from service an escort will be necessary. Recommend discharge

from service and transference to an institution to be designated by the War Risk Bureau * * * 100% disabled." (See V. A. folder.)

Certificate of Disability for Discharge provides as follows:

"Recommended for discharge because of Dementia Praecox, simple type."

4/25/20—Insured transferred from the Fort Sheridan Base Hospital, Ill., to the Kings County Hospital, Brooklyn, New York, and honorably discharged from the service.

4/29/20—Insured transferred from the Kings County Hospital, Brooklyn, New York, to the Kings Park State Hospital, Kings Park, Long Island.

Point Two

The insured has been permanently and totally disabled for insurance purposes from June 1, 1920, date of lapse of policy by reason of nonpayment of premium due May 1, 1920, to date.

The Insured has been permanently and totally disabled for
32 insurance purposes since June 1, 1920, date of lapse, as appears from (a) the medical history, (b) the economic history, and (c) ratings for compensation purposes.

A

MEDICAL HISTORY

From June 1, 1920, date of lapse of policy, to the present date, all the physicians who have examined the Insured have diagnosed his condition as Dementia Praecox, incurable, incompetent, and insane.

The following is a record of the medical history of the Insured during this period:

6/13/20—Discharged from the Kings Park State Hospital, Kings Park, Long Island, to the custody of the Committee.

3/11/21—Letter from Medical Adviser to Surgeon of Public Health Service provides as follows:

"Discharged—Suffering from Dementia Praecox."

3/23/21—Insured judicially declared incompetent and Committee appointed.

12/10/29—Examined at New York Regional Office and condition diagnosed as follows:

"Dementia Praecox, mixed type, pronounced, incompetent."

B

ECONOMIC HISTORY

It appears from the many social service reports made by
33 the Veterans' Administration contained in the file relating to

the economic history of the Insured, that he has been unable to pursue any gainful occupation since the date of the lapse of the policy by reason of non-payment of premium and has never worked since such date up to the present time.

It is significant to note that when the Insured was discharged from the Kings Park State Hospital, Kings Park, Long Island, to the custody of the Committee on June 13, 1920, the hospital authorities then stated that vocational training would be of no benefit to the Insured by reason of his mental condition. (See V. A. folder.)

C

RATINGS FOR COMPENSATION

It appears from the ratings for compensation purposes that the Insured has been considered disabled for compensation purposes since April 25, 1920, the date of discharge and while the policy was still in force, up to the present date.

4/26/20—Veterans' Administration rated Insured temporary total for compensation purposes from date of discharge and recommended that a Committee be appointed.

POINT THREE

In view of the history of the insured March 29, 1920, it appears reasonably certain that the insured will be unable to pursue any substantially gainful occupation for the balance of his life.

84

POINT FOUR

The impairment of the insured's mind since March 29, 1920, has been such that it has continuously rendered it impossible for him to follow any substantially gainful occupation and is founded on conditions which render it reasonably certain that it will continue throughout his life.

CONCLUSION

I believe I have demonstrated the following proposition:

1. That the Insured has been permanently and totally disabled for insurance purposes from March 29, 1920, to date and that it is reasonably certain that he will continue to be permanently and totally disabled for insurance purposes for the remainder of his life.

2. That these considerations must lead your learned Council to find that the Insured is entitled to permanent and total disability

benefits from March 29, 1920, to date and in the future throughout the remainder of his life.

Respectfully submitted,

JAMES J. RICHMAN,
Attorney for the Committee of the Person and Property of William Garmes, an Incompetent, 82 Wall Street, New York City.

Dated August 18, 1934.

35 *Exhibit D, referred to in order of reference*

Insurance Claims Council, Veterans Administration, Insurance Claim Council, C 405,970, T 3,046,122.

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, an Incompetent, for permanent and total disability benefits pursuant to the provisions of a yearly renewable term insurance policy in the sum of $10,000 issued by the United States Government.

SUPPLEMENTAL BRIEF OF INSURED

STATEMENT

This supplemental brief is being submitted for the purpose of dealing with the history of the Insured prior to his enlistment, the main brief heretofore submitted not having dealt with this period.

POINT V

The Insured was in sound health prior to July 24, 1918, the date of enlistment in the military service.

(See affidavit of James J. Lowrey sworn to October 13, 1934.)

36 POINT VI

The Insured was in sound health on July 24, 1918, the date of enlistment.

The United States Government having accepted the Insured for military service on July 24, 1918, the Insured was in sound health on that date.

POINT VII

The Insured was in sound health on July 26, 1918, the effective date of insurance.

The Insured having been in sound health on July 24, 1918, the date of enlistment, he was in sound health on July 26, 1918, two days later, the effective date of his insurance.

Dated October 16th, 1934.

Respectfully submitted.

JAMES J. RICHMAN,
Attorney for the Committee of the Person and Property of William Garmes, an Incompetent, 82 Wall Street, New York City.

37 *Exhibit E, referred to in order of reference*

Veterans' Administration, Insurance Claims Council.

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, for permanent and total disability benefit pursuant to the terms of War Risk Insurance policy in the sum of $10,000.

STATE OF NEW YORK,
County of New York, ss:

JAMES J. LOWREY, being duly sworn, deposes and says:

1. I am the Committee of the person and property of William Garmes, the insured herein, and reside at No. 197 Leonard Street, Borough of Brooklyn, City of New York.

2. This is an application by me as Committee of the person and property of William Garmes, the insured herein, for permanent and total disability benefits in the sum of Fifty-seven and 50/100 ($57.50) Dollars per month from the 25th day of April 1920 pursuant to the terms of a War Risk Insurance policy in the sum of $10,000.

3. The pertinent dates in chronological order are as follows:

July 26, 1918—effective date of insurance.

April 25, 1920—Insured transferred from the Fort Sheridan
38 Base Hospital, Ill. to the Kings County Hospital, Brooklyn, New York, and honorably discharged from the service.

April 26, 1920—The Veterans' Administration rated the insured temporary total for compensation purposes from date of discharge, and recommended that a Committee be appointed.

April 29, 1920—Insured transferred from the Kings County Hospital, Brooklyn, New York, to the Kings Park State Hospital, Kings Park, Long Island.

May 1, 1920—Insurance lapsed by reason of non-payment of premium.

March 23, 1921—Insured judicially declared incompetent and Committee appointed.

It appears clearly that the insured has been permanently and totally disabled for insurance purposes since the 25th day of April 1920, the date of his discharge, and for some time prior thereto. On the 25th day of April 1920, the insured was transferred from the Fort Sheridan Base Hospital in Illinois to the Kings County Hospital, Brooklyn, New York, by reason of his disability and within a few days hereafter was transferred to the Kings Park State Hospital, Kings Park, Long Island, and on the 13th day of June 1920, was discharged to my custody. It appears from a letter on file with the Veterans' Administration in New York City that in the opinion of the authorities at the Kings Park State Hospital that vocational training at the date of the insured's discharge from the hospital would be of no benefit to him by reason of his mental condition. The social service reports on file in this matter indicate clearly that the insured has never been able to work since his discharge. The insured has lived with me continuously since the date of his

discharge and I know of my own knowledge that his condition
39 is such that he is unable to work and that he has never worked since the date of his discharge.

In view of the foregoing, I respectfully ask that the disability benefits in the sum of Fifty-seven and 50/100 ($57.50) Dollars per month be granted herein from the 25th day of April 1920 to date, and as long as the insured continues to be permanently and totally disabled for insurance purposes.

(S) JAMES J. LOWREY.

Sworn to before me this 21st day of April 1934.

HATTIE GOLD,
Notary Public.

Bronx Co. No. 53. Cert. filed in New York Co. No. 398. Commission Expires March 30, 1936.

Exhibit F, referred to in order of reference

Veterans' Administration, Insurance Claims Council, C 405,970, T 3,046,122.

In the Matter of the Estate of William Garmes, Incompetent.

STATE OF NEW YORK,
County of New York, ss:

James J. Richman, being duly sworn, deposes and says:
40 1. I am an attorney and counsellor at law duly admitted to practice before the Veterans' Administration and represent James J. Lowrey, the Committee of the person and property of William Garmes, an incompetent, the Insured herein in connection with an application for permanent and total disability benefits from the date of discharge pursuant to the terms of a War Risk insurance policy in the sum of Ten thousand ($10,000.00) Dollars.

2. This affidavit is being submitted on the occasion of the hearing before the Insurance Claims Council on the 25th day of July 1934 at 2:45 P. M., Room 310 Arlington Building, Washington, D. C.

3. The pertinent dates in chronological order are as follows:

7/24/18—Insured enlisted in the army.

7/26/18—Effective date of insurance.

3/29/20—Certificate of disability for discharge provides "Recommended for discharge because of Dementia Praecox, simple type."

Report of Board of Medical Officers provides as follows:

"Dementia Praecox, simple type, characterized by ideas of persecution and of reference, inadequate reaction to environment, silly inconsequential laughter, emotional deterioration * * * Disability is regarded as permanent. Soldier cannot be discharged from service without danger to himself or others. If discharged from service an escort will be necessary and transference to an institution to be designated by the War Risk Bureau * * * 100% disabled."

41 4/25/20—Insured transferred from the Fort Sheridan Base Hospital, Ill., to the Kings County Hospital, Brooklyn, New York, and honorably discharged from the service.

4/25/20—Veterans' Administration rated insured temporary total for compensation purposes from date of discharge and recommended that a Committee be appointed.

4/29/20—Insured transferred from the Kings County Hospital, Brooklyn, New York, to the Kings Park State Hospital, Kings Park, Long Island.

5/1/20—The insurance lapsed by reason of non-payment of premium.

3/11/21—Letter from Medical Adviser to surgeon of public health service provides: "Discharged—suffering from Dementia Praecox."

3/23/21—Insured judicially declared incompetent and Committee appointed.

12/10/29—Medical examination at New York Regional office. Diagnosis as follows: "Dementia Praecox, mixed type, pronounced incompetent."

4. Insured has been rated for compensation purposes as follows:

4/25/20 to 6/12/20—Temporary total.

6/13/20 to 4/10/21—Temporary partial, less than 10%.

(a) It is significant to note that the Veterans Administration has decided by a finding that the insured has been incompetent and insane since March 24th, 1921.

42 4/20/21—to 9/19/21—Fifty percent temporary partial.

9/20/21—7/26/22—Twenty percent temporary partial.

7/27/22—1/7/23—Fifty percent temporary partial.

1/8/23 to 12/9/29—Temporary total.

12/10/29 to date—Permanent total.

5. It is respectfully requested that affidavit of James J. Lowrey, Committee, sworn to the 21st day of April 1934 which accompanied the application for permanent and total disability benefits be considered on this hearing.

CONCLUSION

It appears clearly from the foregoing as follows:

(a) That the insured has been permanent and total for insurance purposes since the date of his discharge.

(b) That the mental condition of the insured is such that it is reasonably certain that he will be unable to pursue any gainful occupation for the remainder of his days.

(c) That the insured is entitled to Fifty-seven and 50/100 ($57.50) Dollars per month from April 25, 1920, the date of discharge, to date, and thereafter as long as he lives and as long as he is permanent and total for insurance purposes.

(S) JAMES J. RICHMAN.

Sworn to before me this 14th day of August 1934.

WILLIAM S. HAUSER,
Notary Public, Kings Co.

Certificate filed N. Y. Co.

43 *Exhibit G, referred to in order of reference*

Veterans' Administration, Insurance Claims Council.

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, for permanent and total disability benefit pursuant to the terms of War Risk Insurance policy in the sum of $10,000.

STATE OF NEW YORK,

County of New York, ss:

James J. Lowrey, being duly sworn, deposes and says:

1. I am the Committee of the Person and Property of William Garmes, the insured herein.

2. I am submitting this affidavit for the purpose of dealing with the history of the insured prior to July 24, 1918, the date of his enlistment in the military service.

3. The insured was in sound health prior to July 24, 1918, date of his enlistment. I have been in constant association with him since his birth and grew up in the same household with him. After the insured left school, he worked in different factories in the City of New York and also as a teamster. His health was exceptionally good prior to his enlistment, the Insured having never been sick.

4. The insured was in sound health on July 24, 1918, the
44 date of enlistment, the U. S. Government having accepted him for enlistment in the military service.

5. The insured having been in sound health on July 24, 1918, the date of enlistment, he was in sound health on July 26, 1918, two days later, the effective date of his insurance.

6. In view of the fact that the insured was in sound health prior to his enlistment and on the date of his enlistment and on the effective date of his insurance, and since his disability arose subsequent to these dates, I respectfully contend that he became permanently and totally disabled for insurance purposes on or about the 29th day of March 1920.

JAMES J. LOWREY.

Sworn to before me, this 13th day of October 1934.

WILLIAM S. HAUSER,
Notary Public, Kings Co.

Commission expires March 30, 1936.

Exhibit H, referred to in order of reference

Veterans' Administration, Insurance Form 543, Rev. April 1931.
Decision of Insurance Claims Council, Oct. 31, 1934, C-No. 405,970, FDE, MM: cl: mpg.

45 In re: Garmes, William (Name of Insured). Care of James J. Lowrey, Committee, 197 Leonard Street, Brooklyn, New York (Address).

CLAIM

In this case, claim was filed under date of April 23, 1934, for the payment of the insurance of the above captioned insured, it being alleged that he became permanently and totally disabled April 25, 1920, the date of his discharge from the service. There was a hearing held on the case before the Council October 19, 1934, and the representative of the insured and his guardian at that time, claimed the existence of permanent and total disability from March 29, 1920.

FACTS

The insured's period of military service was from July 24, 1918, to April 25, 1920, when he was discharged on a surgeon's certificate of disability due to dementia praecox.

While in active service, July 26, 1918, the insured was granted war risk term insurance in the amount of $10,000. He did not pay any premiums after his discharge from the service.

On his discharge, he was immediately admitted to the Kings Park State Hospital, New York, and was continued in this institution until June 13, 1920, when he was discharged to the custody of a member of his family.

At the time of an examination made of him January 21, 1921, the examiner said that he was apathetic and listless; that he
46 took no interest in anything going on about him; that he made no complaints; that he said he used to have the idea that people read his thoughts; that he could not sleep. The examiner further stated that his memory appeared good; orientation intact; attention weakened; association of ideas sluggish, that indifference seemed to be the chief characteristic; that there appeared to be some mental deterioration; that his facial expression was silly; that he complained of headaches and sleeplessness. Diagnosis—dementia praecox, simple type.

He has been periodically examined since this time and all of these examinations show him to me markedly disabled and mentally incompetent.

The most recent report of examination of record is that of August 27th of this year. He complained of headaches and dizzy spells. On the mental examination, the examiner said that he was poor in appearance, uncooperative, fairly attentive; that he denied delusions and hallucinations; that he was emotionally stable, limited schooling, somewhat weak mentally, poor insight, unable to figure, planless, memory poor, well oriented; that he conveyed no real information; that he stated he ate and slept well and was only nervous when he heard a loud noise; that he was not depressed, not excited, had no fits, no mannerisms; that he showed general indifference; not anti-social, well oriented, poor memory, no judgment and deterioration was noted. Diagnosis—dementia praecox, pronounced.

It is claimed that the insured became totally incapacitated for the continuous pursuit of substantially gainful employment March 29, 1920. His service record shows that he became unfit for military duty July 1919, on account of dementia praecox. On his discharge from the service April 25, 1920, he was transferred
47 immediately to an institution for the treatment of mental diseases and was continued therein until June 13, 1920. Examinations made of him at this institution showed him to be suffering from dementia praecox.

He has been periodically examined since July 16, 1920 and these examinations show him to be markedly disabled and mentally incompetent.

The evidence is clear and convincing that from the time claimed, March 29, 1920, he has been so impaired in mind and body as to render him incapable of any sustained mental effort or physical endeavor. There is no evidence of record that tends to show that he has been gainfully engaged since his discharge from the service.

In view of the nature of the insured's major disabling condition of dementia praecox, the long period that he has suffered from this condition and that he is now mentally deteriorated, it can be said with reasonable certainty that throughout his life he will be totally incapacitated for the continuous pursuit of any substantially gainful occupation.

DECISION

It is the decision of the Council that for insurance purposes the insured has been permanently and totally disabled from March 29, 1920 as claimed. Date of receipt of due proof of permanent and total disability—April 23, 1934. Incompetent.

(S) M. Mills,
M. MILLS, *Legal Member.*

(S) H. M. CHANEY,
Medical Member.

EDWARD A. LEONARD, M. D.,
N. P. Consultant.

(S) H. H. MILLS,
Chief, Insurance Claims Council.

48 *Exhibit "I", Referred to in Order of Reference*

VETERANS ADMINISTRATION INSURANCE CLAIMS COUNCIL

In the Matter of the Estate of WILLIAM GARMES, *Incompetent.*

William Schick, states as follows:—

I

1. I am a physician licensed to practice medicine in the State of New York, specializing in neurology and psychiatry.

2. My qualifications are as follows:—
(a) Graduate of L. I. College of Medicine 1926.
(b) Assistant Physician at Manhattan State Hospital, Wards Island, 1930–1931.
(c) At present associate attending neurologist at Neurological Institute.
(d) Adjunct neurologist at Montefiore Hospital.
(e) Adjunct neurologist at Beth Israel Hospital.
(f) Instructor in Neurology College of Physicans and Surgeons, Columbia University.

II

3. I have been requested to assume the following facts to have been established:—

That a young man, age 29, was accepted in the service on June 24th, 1918, in good health, his condition of health prior to said
49 date having been good and his industrial history after he left school consisting of employment as teamster and factory hand; that on March 29th, 1920, a Board of Medical Officers issued a report as follows:

"Dementia Praecox, simple type, characterized by ideas of persecution and of reference, inadequate reaction to environment, silly inconsequential laughter, emotional deterioration * * * Disability is regarded as permanent. Soldier cannot be discharged from service without danger to himself or others. If discharged from service an escort will be necessary. Recommended discharge from service and transference to an institution to be designated by the War Risk Bureau—100% disabled. Recommended for discharge because of Dementia Praecox, simple type."

That on April 25, 1920, he was honorably discharged from the service and transferred from the Fort Sheridan Base Hospital, Illinois, to the Kings County Hospital, Brooklyn, New York, with a rating of total disability for compensation and a recommendation that a Committee be appointed; that on April 29th, 1920, he was transferred from the Kings County Hospital to the Kings Park State Hospital, Kings Park, Long Island, New York; that on June 13th, 1920, he was discharged from the Kings Park State Hospital to the custody of his brother, the hospital authorities stating at that time as follows:

"That vocational training would be of no benefit to him because of his mental condition."

50 That on January 21, 1921, he was examined, the findings being as follows:

"That he was apathetic and listless; that he took no interest in anything going on about him; that he made no complaints; that he used to have the idea that people read his thoughts; that he could not sleep. His memory appeared good; orientation intact; atten-

tion weakened; association of ideas sluggish; indifference seemed to be the chief characteristic; that there appeared to be some mental deterioration; that his facial expression was silly; that he complained of headaches and sleeplessness. Diagnosis—dementia praecox, simple type."

That on March 11th, 1921, he was again examined by the medical adviser to the surgeon of the Public Health Service, the diagnosis being dementia praecox; that on March 23rd, 1921, he was judicially declared incompetent and a committee was appointed; that from March 23rd, 1921, to December 10th, 1929, he was examined on numerous occasions the diagnosis being dementia praecox; that on December 10, 1929, he was examined, the diagnosis being dementia praecox, mixed type pronounced incompetent; that on August 27th, 1934, he complained of headaches, dizzy spells and the examiner found as follows:

"That he was poor in appearance, uncooperative, fairly attentive; that he denied delusions and hallucinations; that he was emotionally stable, limited schooling, somewhat weak mentally, poor in-
51 sight, unable to figure, planless, memory poor, well oriented; that he conveyed no real information; that he stated he ate and slept well and was only nervous when he heard a loud noise; that he was not depressed, not excited, had no fits, no mannerisms; that he showed general indifference; not anti-social, well oriented, poor memory, no judgment, and deterioration was noted. Diagnosis dementia praecox, pronounced."

III

4. My attention has also been directed to the following definition of permanent and total disability:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

IV

5. On the above my professional opinion has been requested and to the questions submitted I make answer as follows:

Q. Was William Garmes suffering from Dementia Praecox on April 25, 1920?—A. Yes.

Q. Was the disease of Dementia Praecox from which Wil-
52 liam Garmes was suffering such an impairment of his mind as would render it impossible for him to follow continuously any substantially gainful occupation from April 25, 1920 to date, and

was it founded on conditions which would render it reasonably certain to continue for the remainder of his life?—A. Yes.

WILLIAM SCHICK, M. D.

Dated New York City, October 15th, 1934.

Exhibit J, referred to in order of reference

GARMES, WILLIAM

REGISTER SHEET

1934		Hrs.
4- 5	Committee attended office re War Risk Insurance Claim; wrote Director of Insurance, Veterans' Administration, Washington, D. C., re Insurance status	4
4-16	Director of Insurance advised that information was confidential and privileged.	
4-18	Prepared Power of Attorney in my favor which Committee executed.	1
4-18	Wrote Director of Insurance enclosing Power of Attorney with a request for Status of Insurance	1
4-19	Committee received letter from Director of Insurance reading in part as follows: "In accordance with the Act of March 20, 1933, and the amendments thereto Insurance benefits are not payable in this instance and cannot be considered by this administration at the present time"	1
53 4-19	Director of Insurance advised that the Committee had been informed re Insurance status.	
4-20	Examined law relating to Government Insurance	4
4-21	Committee attended office; analyzed records relating to the Estate; prepared Form 579 and 579A and affidavit which Committee executed and mailed same to Director of Insurance, Washington	5
4-22	Examined law relating to Government Insurance	4
4-25	Examined law relating to Government Insurance	4
4-27	Director of Insurance advised: "Under Public No. 2, 73rd Congress, this administration has no authority to give consideration to any claim on War Risk Term Insurance. It will therefore not be possible for this Administration to now consider a claim for Insurance benefits on War Risk Term Insurance."	
4-28	Veterans' Administration acknowledged receipt of Form 579 and 579a and affidavit.	
4-29	Examined law relating to Government Insurance	3
4-30	Examined law relating to Government Insurance	3
5- 1	Examined law relating to Government Insurance	5
5- 2	Examined law relating to Government Insurance	3
5- 3	Director of Insurance again denied claim and referred to letter of April 27, 1934	½
6- 9	Wrote Director of Insurance re claim	½
54 6-15	Director of Insurance acknowledged letter of June 9, 1934.	
		39
6-21	Requested Irving F. Goodfriend, attorney, 205 East 42nd Street, New York City, to check status of claim in Washington	1
6-25	Goodfriend advised that Veterans' Administration, Washington, informed him that they would write me regarding the matter	½
6-27	Requested Louis J. Altkrug, attorney, 521 Fifth Avenue, New York City, to check status of matter in Washington	1
7- 2	Director of Insurance advised me re Goodfriend visit	½
7-19	Prepared petition and notice of motion for an allowance in favor of the Committee by reason of his dependency on the Incompetent; served copy on Regional Attorney, returnable July 24th.	

1934 Hrs.

7-20—Director of Insurance advised that hearing of Insurance Claim is set for July 25, 1934, before the Insurance Claims Council, Washington, D. C.

7-21—Wrote Director of Insurance re intention to appear before the Insurance Claims Council to argue the claim in person ½

7-23—Director of Insurance advised me by wire that hearing set for July 25, 1934, had been adjourned without date because parent folder not in Washington ½

7-24—Attended Court re application for allowance to Committee by
55 reason of dependency on Incompetent; submitted original motion papers.

7-25—Received copy of affidavit in opposition of Regional Attorney by Abraham Schwartz sworn to July 25, 1934 ½

7-27—Prepared Reply Affidavit by James J. Richman and submitted same to the Court; copy to Regional Attorney 1

8- 1—Wired Director of Insurance requesting new hearing date ½

8- 4—Advised by Director of Insurance that upon receipt of parent folder new hearing date would be fixed ½

8-14—Wrote Director of Insurance enclosing affidavit sworn to August 14, 1934, by James J. Richman requesting oral hearing date 3

8-16—Committee attended office, analyzed records relating to Estate and conferred with Committee re history of Incompetent prior to his enlistment, during his enlistment and subsequent to his discharge to date 4

8-18—Prepared Brief and forwarded same to Director of Insurance, Washington 5

8-23—Director of Insurance acknowledged receipt of letter of August 14, 1934.

8-27—Director of insurance acknowledged receipt of letter of August 18, 1934.

8-28—Wrote United States Hospital No. 81 re physical examination of Incompetent ½

8-31—United States Hospital No. 81 acknowledged receipt of letter of August 28, 1934.

20

56 10-11—Director of Insurance advised re hearing set for October 19, 1934, before the Insurance Claims Council Washington, D. C. ½

10-13—Committee attended office; prepared affidavit which he executed; called Dr. William Schick, Psychiatrist, and made an appointment for October 15, 1934; prepared Hypothetical Statement for Dr. Schick; wrote Director of Insurance re intention to attend hearing 5

10-15—Saw Dr. Schick at his office; discussed matter. Submitted Hypothetical Statement to him which he signed 3

10-16—Prepared Supplemental Brief 2

10-17—Examined records relating to Estate in County Clerk's Office, Kings 3

10-18—Left for Washington. Upon arrival in Washington, examined Veterans' Administration's folder. Argued claim before Insurance Claims Council on October 19, 1934, at 2:00 P. M. Left Washington Friday October 19, 1934, and arrived in office Saturday A. M. October 20, 1934 50

10-31—Insurance Claims Council granted claim as of March 29, 1920 ½

11- 6—Director of Insurance advised that claim had been granted on October 31, 1934 ½

11-23—Prepared petition and order authorizing Committee to file further bond in the sum of $11,500.00; arranged for execution of petition by Committee; submitted original petition and order to Court which was signed by Mr. Justice Brower 5

11-27—Procured certified copy of order; arranged for execution by
57 Committee of application for $11,500.00 bond and *bond and* delivered same to the American Surety Co. of New York; submitted bond to Court for approval which was approved by Mr. Justice Brower; procured certified copy of bond 5

		Hrs.
1934		
12- 4	Mailed certified copy of order authorizing the filing of a further bond in the sum of $11,500.00 and certified copy of bond to the Regional Attorney of the Veterans' Administration	F.
12- 8	Regional Attornely acknowledged receipt of order and bond	½
12-10	Prepared Form 682; arranged for execution by Committee and mailed same to Regional Attorney of Veterans' Administration	1
12-13	Wrote Committee re Status of Insurance award	1
1935		
1- 9	Wrote Director of Insurance urging release of Insurance award	½
1-21	Director of Insurance acknowledged letter of January 9, 1935, advising that insurance award was being released	½
1-22	Committee received check from the Treasurer of the United States in the sum of $10,235.00 representing Insurance Disability benefits at the rate of $57.50 per month from March 29, 1920, to December 29, 1934, being 178 months	1
		80
2-14	Advised the Committee that check for $10,235.00 had been deposited as follows: $2,000.00 in Brooklyn Savings Bank, $4,118.00 in Fulton Savings Bank and $4,117.00 in South Brooklyn Savings Bank and filed certified copy of order appointing Committee with each bank	1
4- 5	Attended with Committee before Referee Gallagher and submitted brief re commissions and extra allowance to Committee re Insurance recovery	5
4- 9	Prepared petition by James J. Richman and affidavit by Committee and order allowing $25.00 representing disbursements for Washington trip; procured consent of Regional Attorney, Veterans' Administration and submitted papers to Court, order being signed by Mr. Justice Brower	4
4-25	Requested Referee Gallagher to submit report without delay	½
5-18	Wrote to Referee Gallagher re testimony of Committee	3
6- 4	Prepared affidavit by Committee in opposition to recommendations contained in report of Referee Gallagher and submitted same to Court.	
6-24	Procured Record on Appeal and Briefs in case of "Hines v. McKinley" re extra allowance and submitted same to Judge Brower.	
8- 1	Spoke with Schwartz of Regional Attorney's office re increase of allowance to Committee to $100.00 per month for the maintenance and support of Incompetent.	
8- 2	Regional Attorney advised re increased allowance and requested that order include a direction requiring the Committee to invest $11,000.00 in U. S. Government Bonds	½
8-29	Regional Attorney inquired re order relative to increased allowance and investment	½
10- 2	Regional Attorney requested a reply re new order and investment	½
10-23	Prepared petition and order allowing $100.00 per month to Committee for support and maintenance of Incompetent and permitting Committee to invest $11,000.00 in Government Bonds	3
1936		
2- 7	Opinion appeared in Law Journal based on application for commissions and extra allowance before Referee Gallagher. Analyzed same	5
2-17	Prepared petition and notice of motion for commission to file Intermediate Judicial Accounting; arranged for execution by Committee	5
2-19	Served copy of motion papers for Intermediate Accounting returnable February 25, 1936, on Regional Attorney of the Veterans' Administration.	
2-25	Attended Court and at the request of Regional Attorney motion adjourned to March 10, 1936.	
		23

1936 Hrs.

3-10—Attended Court. Argued application for permission to file Intermediate Accounting. Judge Brower denied application and requested Brief re extra allowance to Committee. Regional Attorney submitted affidavit sworn to March 10, 1936, in opposition.

3-16—Wrote Washington for photostat of report of hearing held before the Insurance Claims Council on October 19, 1934. Submitted order denying motion for Intermediate Accounting and advised Judge Brower that separate application would be made for an extra allowance to the Committee re Insurance recovery.

60

3-31—Prepared petition by Committee and affidavit by James J. Richman for an extra allowance to the Committee; arranged for execution by Committee; served copy of papers on Regional Attorney, returnable April 8, 1936.

4-8—Attended Court and at request of Regional Attorney adjourned to April 20, 1936.

4-20—Attended Court; argued application; submitted Brief. Regional Attorney submitted affidavit in opposition sworn to April 17, 1936, by Abraham Schwartz.

4-22—Received reply affidavit in opposition from Regional Attorney by Abraham Schwartz sworn to April 21, 1936.

5-20—Saw Mr. Zelhoffer, Secretary to Judge Brower, and gave him "Stein" opinion for submission to judge.

5-21—Committee attended at office and went with him to American Surety Co. of New York and Brooklyn Savings Bank and arranged for investment of $4,500.00 in U. S. Government Bonds.... 3

6-11—Spoke with Mr. Zelhoffer, Secretary to Judge Brower, and delivered letter to him addressed to Judge Brower requesting permission to withdraw application for extra allowance to Committee argued on April 20, 1936, in view of "Stein" decision. Advised him of intention to make application for attorney's fee. Estimated hours consumed which were not recorded..... 35

200

61 In Supreme Court of New York, Kings County.

Answering affidavit of Abraham Schwartz, referred to in order of reference.

STATE OF NEW YORK,
County of New York, ss:

Abraham Schwartz, being duly sworn deposes and says that he is an Attorney and Counsellor at Law, duly admitted to practice in the State of New York and is an Attorney of the Veterans' Administration, with offices at 341 Ninth Avenue, in the Borough of Manhattan, City and State of New York.

Your deponent states that by reason of his official connection with the Veterans' Administration, he has access to the confidential records of William Garmes, an incompetent veteran, and appears herein to oppose the granting of any relief as sought in the Notice of Motion dated August 1, 1936, in the petition verified July 3, 1936, of James J. Lowrey, the incompetent's committee, and the affidavit sworn to July 3, 1936, by James J. Richman, Esq., the attorney for said committee.

Incidentally, it may be of interest for this Court to note that James J. Lowrey, the committee herein, through his attorney James J. Richman, brought on a motion before this Court at Special

Term, before Mr. Justice Brower, which was returnable on April 8, 1936, for similar relief, which motion was argued orally before Mr. Justice George E. Brower at Special Term, Part VI, on
62 April 20, 1936, by Attorney James J. Richman in support of such application, and your deponent in opposition to same; and after the submission of the moving papers and the affidavit in opposition thereto, Attorney James J. Richman, in a letter addressed to Mr. Justice Brower dated June 11, 1936, asked for permission to withdraw the application so argued and submitted before Mr. Justice Brower, which resulted in the Court's permission to have such application withdrawn. A copy of the letter from Attorney James J. Richman to Mr. Justice George E. Brower is attached hereto and marked "Exhibit A."

The Court is asked to deny the relief sought because the application is nothing more or less than a subterfuge to obtain indirectly what the committee and the attorney for the committee have been unable to obtain directly.

Your dependent states and the records bear out your deponent's contention that it required no obstruse ability or exhaustive analysis to obtain the insurance benefits which were awarded by the Veterans' Administration to this incompetent person. The colossal task and the piecing together of the law with respect to War Risk Insurance set forth in detail by both the committee and the attorney for the committee, raises a grave doubt as to the purpose of this application.

The records show that insurance was awarded the veteran by the Insurance Claims Council on or about October 31, 1934, after the usual administrative procedure. The Court is asked to bear in mind that there were over 55,000 claims filed for insurance during the
63 months immediately preceding November 1934, and that it was the policy and it still is the policy of the Veterans' Administration to pass upon these claims in the order of their receipt.

The Court is further informed that the counsel in this proceeding was well aware of the procedure followed by the Veterans' Administration because he is a recognized pension attorney, having been granted a license to practice before this government body by the Administrator of Veterans' Affairs.

The Court is asked not to lose sight of the fact that the petitioner herein is an interested party in this proceeding and that he has been denied an allowance out of this estate by reason of his alleged dependency. This application was before this Court in July 1934.

Following the granting of the insurance, this committee, through his attorney, applied to the Court for an order judicially settling the accounts of the committee, and your deponent, by reason of his personal review of similar cases in which the counsel herein has appeared before the Veterans' Administration, believes that the sole object of the bringing on of the motion to judicially settle the intermediate account of the committee was so that the counsel herein could obtain his monetary reward for the alleged services he performed in the obtaining of the insurance for this incompetent.

The Court is informed that the statutory provision relative to War Risk Insurance permits the payment of $10.00 only to anyone assisting in the presentation of evidence before the Veterans' Administration, unless a suit has been commenced and issue joined. It further provides that a suit can only be brought after the Administrator of Veterans' Affairs has refused to grant the
64 claim. None of these provisions have been met in the present case and the particular section involved is Section 500 of the World War Veterans' Act of 1924, as amended, and the Court is referred to the decision in this department upholding the law, see in re Shinberg, 263 N. Y. Supplement 354.

Your deponent respectfully calls this Court's attention to the decision rendered by the Supreme Court, Appellate Division, First Department, in March 1933, in the last mentioned case entitled "In the Matter of the Estate of Fred Shinberg, an Incompetent Person," wherein Mr. Justice Francis Martin, in the annexed opinion, referred to Section 500 of the World War Veterans' Act of 1924, as amended, otherwise referred to as Title 38, U. S. Code Annotated, S. 551, which reads as follows:

"Amount permitted to be paid agents or attorneys; solicitation, etc., of unauthorized fees or compensation; punishment. Except in the event of legal proceedings under Section 445 of this Chapter, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Parts II, III, and IV of this Chapter, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not
65 exceed $10 in any one case; provided, however, that wherever a judgment or decree shall be rendered in an action brought pursuant to Section 445 of this Chapter the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys for the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid. Any person who shall directly or indirectly solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive, any fee or compensation, except as herein provided, shall be guilty of a misdeamnor, and for each and every offense shall be punishable by a fine or not more than $500 or by imprisonment at hard labor for not more than two years or by both such fine and imprisonment."

The Appellate Court continues as follows:

"We are confronted with the emphatic language of this statute which provides that an attorney must not take more than ten dollars for services rendered to an incompetent person, unless a judg-

ment or decree is entered, at which time the court must provide
66 in said judgment or decree for the allowance of a reasonable fee not to exceed ten per centum of the amount recovered and to be paid. This statute was considered in Margolin v. United States (269 U. S. 93) where the Court held that the statute does not prevent a guardian or other person, paying out of his own funds compensation to an attorney for his services, but that the estate of the ward should not be taxed with an additional fee unless suit is filed."

The Appellate Court, in the case of Shinberg, supra, recites with approval the language contained in The Matter of Zadurian (142 Misc. 24), wherein the Surrogate of New York County in a similar case disallowed a claim of $1,500. stating:

"This court will not affirmatively join in a violation of the rules governing attorney's fees in such Federal matters as the war risk insurance. The amount involved in the assignment does exceed the allowance permitted by the Federal rule. * * * The claim in the sum of $1,500 is disallowed."

The Appellate Court, in the case of Shinberg, supra, continues as follows:

"The argument is here made that suit was brought in the present instance. It must be admitted, however, that the suit was discontinued and the claim settled by the government direct with the committee for the incompetent.

67 "This is not a case where a judgment or decree was entered. Although the statute does say that the ten dollar limitation applies where no suit has been filed, nevertheless it also provides that any allowance to be made where a suit has been filed must be made in the judgment or decree growing out of that action.

"There may be cases where the enforcement of this statute will result in a hardship. Admitting that this may be such a case, nevertheless the necessity for such a statute must be apparent, especially in view of the great need of protection for people who really are wards of the court and who, in the absence of such statutory provision, would, in many cases, be preyed upon by the unscrupulous. Because it safeguards and protects the unfortunates who are wholly dependent upon the Government for support, this statute should be rigidly enforced.

"In the present case, the Court had no power to award any portion of the War Risk Insurance to the attorney for the committee of the incompetent.

"The order should be reversed and the motion granted."

In this connection, your deponent further calls this Court's attention to Title II—Agents and Attorneys—Section 201, of Public Act No. 844 of the 74th Congress, approved and enacted on June 29, 1936, which definitely undertakes to put limitation upon State Courts, in respect to Guardians or to permit any executive officer, by rule
68 or otherwise, to prescribe the method of payment of fees in allowed claims. Public II—Agents and Attorneys—Section

201, Public Act No. 844 of the 74th Congress just referred to reads as follows:—

"The Administrator of Veterans' Affairs is hereby authorized, under such rules and regulations as he may prescribe, to recognize agents and attorneys in the preparation, presentation, and prosecution of claims under statutes administered by the Veterans' Administration. The rules and regulations prescribed by the Administrator of Veterans' Affairs may require of such agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of claims, and the Administrator of Veterans' Affairs may, after notice and opportunity for a hearing, suspend or exclude from further practice before the Veterans' Administration any such agent or attorney shown to be, or to have been, engaged in unlawful, unprofessional or dishonest practice, or guilty of disreputable conduct, or who is incompetent, or who has violated or refused to comply with the laws, regulations, or instructions governing practice before the Veterans' Administration, or who shall in any manner deceive, mislead, or threaten any claimant or prospective claimant by word, circular, letter or advertisement. *The Administrator of Veterans' Affairs is further authorized to determine and pay fees in allowed claims for monetary benefits under statutes administered by the Veterans' Administration to agents and attorneys recognized as provided in this title and to prescribe rules and regulations governing entitlement to and the amount and mode of payment of such fees: Provided, That payment of such fee shall not exceed $10 in any one claim, and in all cases fees shall be deducted from the amount of monetary benefits allowed.*" [Note: Italics by deponent.]

As to violation of the aforementioned statute Section 201 of Public Act No. 844, 74th Congress, Section 202 of Public Act No. 844, 74th Congress reads as follows:

"Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation except as provided in section 201, or who shall wrongfully withhold from a beneficiary or claimant the whole or any part of the benefit or claim allowed and due a beneficiary or claimant shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for very offense be fined not exceeding $500 or imprisoned at hard labor not exceeding two years, or both, in the discretion of the court."

This Court at Special Term has consistently and on innumerable occasions adhered to the policy that disproportionate withdrawals from the funds of incompetent veterans' estates, whether they be in the form of fees to attorneys, special guardians, or for the benefit of dependents of incompetent veterans, should be discouraged.

The undersigned further submits that the incompetent is a ward of this Court and his estate is always under the care and supervision of the Court. The fact must not be lost sight of that the funds comprising the estate of this incompetent person were paid by the United States Government, and that the object of Congress would be thwarted and defeated if excessive fees and withdrawals were allowed to be taken from the estate to the detriment of the ward. The Supreme Court has inherent power to protect all interests of incompetents in addition to the power expressly conferred upon it by the Civil Practice Act for that purpose.

Fiero on Particular Actions and Proceedings, page 285;

Matter of Joseph S. Rode, 262 N. Y. S. 875, App. Div. 1st Department, February 10, 1933.

In the Matter of Arthur Cox Glenn, January 13, 1932, Court of Appeals, Kansas City, Missouri, 46 S. W. (2d) 200, the Court uses the following language:

71 "The purpose of state and federal legislation is obvious respecting the administration of the veterans' funds. The concern of national and local government is evidenced by these legislative expressions. Moneys of the disabled veterans should be expended insofar as possible for their direct needs and comforts, with little diversion for administration costs and fees. Accordingly, such legislation must be construed and applied broadly and liberally toward this end. The sick and helpless veterans have need of every dollar allotted to them. Such pitiful cases as the ward herein (and there are no doubt numerous others) require sympathetic consideration. All comforts and benefits which allowances made to them may procure should be conserved at least insofar as provided by law."

Your deponent further respectfully refers this Court to Section 200 of Public Act No. 844 of the 74th Congress which reads as follows:

"The Administrator of Veterans' Affairs is hereby authorized to recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans of the World War, the Grand Army of the Republic, the United Spanish War Veterans, Veterans of Foreign Wars, and such other organizations as he shall approve, in the presentation of claims under stat-

72 utes administered by the Veterans' Administration. However, no such representative shall be recognized until a certificate has been filed in the Veterans' Administration, under such rules as the Administrator of Veterans' Affairs may prescribe, certifying that *no fee or compensation of whatsoever nature shall be charged veterans or the dependents of veterans for service rendered.* The rules prescribed by the Administrator of Veterans' Affairs shall contain a provision requiring in each claim the filing of a power of attorney in such manner and form as the Administrator of Veterans' Affairs shall prescribe. The Administrator of Veterans' Affairs is further authorized in his discretion, under such regulations as he may prescribe, to recognize any person for the purpose of a particu-

lar claim under the conditions and limitations of this section." (Italics are your deponent's.)

In this connection, your deponent further desires to impress the fact that the service organizations recognized in the presentation of claims make no charge for their services and do not limit their assistance to their members. While it has long been recognized that a claimant should not be denied the right to employ his own attorney or agent to assist him, and while the laws and Veterans' Administration Regulations provide for the payment of fees under certain limitations, it is not necessary for any person to incur any expense for services in the preparation and presentation of claims under laws administered by the Veterans' Administration.

73 It may be of interest for this Court to note that the hearing before the Veterans' Administration Insurance Claims Council, which Attorney James J. Richman attended on October 19, 1934, consumed only fifteen minutes, namely from 2.45 P. M. to 3 P. M. A copy of the minutes of such hearing is hereto attached and marked Exhibit B. It is also to be noted that by virtue of a power of attorney executed on July 7, 1934, by Pension Attorney James J. Richman, a Captain Fred Kochli, representative of the Disabled American Veterans of the World War, attended before the said Insurance Claims Council under date of October 24, 1934, and a notation of such attendance appears in the enclosed minutes of the hearing, and in accordance with the terms of such power of attorney, the said representative of the Disabled American Veterans of the World War was to accept no fee or compensation for his services for appearing for Attorney Richman in the prosecution of this claim. A photostatic copy of such power of attorney is hereto attached and marked Exhibit C.

Deponent further adds that with reference to the present application by Attorney James J. Richman that he be allowed the sum of $3,000.00 for his services, it is your deponent's opinion that such an amount is not only unreasonable and excessive, but also unconscionable, when it is taken into consideration that this is a case of a disabled war veteran who is a ward of this Court and of the Nation and whose estate consists chiefly of funds received from the United States Government as a result of his disability arising out of his war services and that each citizen should show some interest in his welfare even to the extent of making sacrifices.

74 Wherefore, your deponent asks this Court to disregard in its entirety any claim on the part of the committee and his attorney for any funds out of this estate in excess of $10 on the ground that this application is simply a subterfuge to obtain by indirect methods monies out of the estate of an incompetent which could not be obtained directly.

ABRAHAM SCHWARTZ.

Sworn to before me, this 12th day of August 1936.

JAMES A. HEVERIN, *Notary Public.*

Bronx Co. No. 31, Reg. No. 51H38. Cert. filed in N. Y. Co. No. 372, Reg. No. 3H195. Commission expires March 30, 1938.

Exhibit A, annexed to affidavit of Abraham Schwartz

[Copy]

James J. Richman, Counselor at Law, 130 Clinton Street, Brooklyn, N. Y. Triangle 5—0550

JUNE 11, 1936.

Hon. GEORGE E. BROWER,
Supreme Court, Brooklyn, N. Y.

75 Re: Garmes, Wm. (Incompetent)

DEAR JUDGE BROWER: On April 20, 1936, an application was argued before you for an extra allowance to the Committee by reason of unusual and extraordinary services rendered by the Committee with the active assistance of his Counsel to the Estate in connection with a recovery under a war risk insurance contract.

On April 27th, 1936, one week later, the Supreme Court of the United States in Hines vs. Stein, No. 659, October Term, 1935, rendered an opinion from which it appears conclusively that a State Court in a Veterans' Committeeship Estate has the power to allow a reasonable fee to Attorney for an Estate for services rendered by him before the Veterans' Administration.

In view of the foregoing, I respectfully ask for permission to withdraw the application argued before you on April 20th, 1936, for an allowance in favor of the Committee.

I propose to make an application on my own behalf, as Attorney, for a fee out of the Estate for services which I rendered to the Estate before the Veterans' Administration in connection with the insurance recovery.

Respectfully yours,

(Signed) James J. Richman,
JAMES J. RICHMAN.

JJR/HS.

76 *Exhibit B, annexed to affidavit of Abraham Schwartz*

VETERANS' ADMINISTRATION,
INSURANCE CLAIMS COUNCIL,
Washington.

C–405970

GARMES, WILLIAM,
JAMES J. LOWREY, *Committee,*
197 Leonard Street, Brooklyn, New York.

A hearing was held in Room 115, Arlington Building, Friday, October 19, 1934, at 2:45 P. M., with the following members present: Mr. M. Mills, Chairman; Dr. H. M. Chaney; Dr. E. H. Cooper.

The claimant did not appear in person, but was represented by Mr. James J. Richman, Attorney at Law.

Mr. MILLS. The Insurance Claims Council is convened for the purpose of hearing argument and receiving evidence with a view to show that the above captioned insured has been permanently and totally disabled for insurance purposes from March 29, 1920.

The insured did not appear in person, but was represented by Mr. James J. Richman, Attorney at Law, 82 Wall Street, New York, N. Y.

Mr. Richman, you have power of attorney to represent the insured, have you?

MR. RICHMAN. Yes, sir.

Mr. MILLS. It is in the folder?

Mr. RICHMAN. Yes, sir.

77 Mr. MILLS. All right, Mr. Richman.

Now tell us, Mr. Richman, why it is believed the insured is entitled to the payment of his insurance from March 29, 1920.

Mr. RICHMAN. I have a brief outline here and I believe if I follow that it will cover everything I have to say.

This is an application by James J. Lowrey as committee of the person and property of William Garmes, an incompetent, the insured herein, for permanent and total disability benefits of $57.50 per month from the 29th day of March 1920, pursuant to the provisions of yearly Renewable Term insurance policy in the sum of $10,000 issued by the United States Government to the insured herein, which provides in part as follows:

"Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

Now the pertinent insurance dates in chronological order are as follows: July 24, 1918—the insured enlisted; July 26, 1918—effective date of insurance; April 25, 1920—insured honorably discharged; June 1, 1920—the insurance lapsed by reason of the non-payment of premium due May 1, 1920.

POINT ONE

The insured was in sound health prior to July 24, 1918, the
78 date of enlistment in the military service. At this time I desire to offer in evidence an affidavit by James J. Lowrey, the committee, sworn to the 13th day of October 1934, from which it appears as follows:

"The insured was in sound health prior to July 24, 1918, date of his enlistment. I have been in constant association with him since his birth and grew up in the same household with him. After the insured left school, he worked in different factories in the City of New York and also as a teamster. His health was exceptionally good prior to his enlistment, the insured having never been sick."

Point Two

The insured was in sound health on July 24, 1918, the date of enlistment. The United States Government having accepted the insured for military service on July 24, 1918, the insured must be presumed to have been in sound health on that date.

Point Three

The insured was in sound health on July 26, 1918, the effective date of insurance. The insured having been in sound health on July 24, 1918, the date of enlistment, he was in sound health on July 26, 1918, two days later, the effective date of his insurance.

Point Four

The insured was permanently and totally disabled for insurance purposes while the policy was still in force. While the policy
79 was in force prior to June 1, 1920, the history of the insured was as follows:

March 29, 1920 the Board of Medical Officers issued a report reading as follows:

"Dementia Praecox, simple type, characterized by ideas of persecution and of reference, inadequate reaction to environment, silly inconsequential laughter, emotional deterioration * * * Disability is regarded as permanent. Soldier cannot be discharged from service without danger to himself or others. If discharged from service an escort will be necessary. Recommend discharge from service and transference to an institution to be designated by the War Risk Bureau * * * 100% disabled."

Certificate of disability for discharge provides as follows:

"Recommended for discharge because of Dementia Praecox, simple type."

On April 25, 1920, the insured was transferred from the Fort Sheridan Base Hospital, Ill., to the Kings County Hospital, Brooklyn, N. Y., and honorably discharged from the service.

On April 29, 1920, the insured was transferred from the Kings County Hospital, Brooklyn, N. Y., to the Kings Park State Hospital, Kings Park, Long Island.

Point Five

The insured has been permanently and totally disabled for insurance purposes from June 1, 1920, date of lapse of policy
80 by reason of nonpayment of premium due May 1, 1920, to date.

The insured has been permanently and totally disabled for insurance purposes since June 1, 1920, date of lapse of insurance, as appears from A, the medical history; B, the economic history; and C, ratings for compensation purposes.

With respect to the medical history from June 1, 1920, date of lapse of the policy, to the present date, all the physicians who have examined the insured have diagnosed his condition as dementia praecox, incurable, incompetent and insane. The following is a record of the medical history of the insured during this period: June 13, 1920—the insured was discharged from the Kings Park State Hospital, Kings Park, Long Island, to the custody of the committee. March 11, 1921—letter from Medical Adviser to the Surgeon of Public Health Service provides as follows: "Discharged—Suffering from dementia praecox." March 23, 1921—the insured was judicially declared incompetent, and a committee was appointed. December 10, 1929—the insured was examined at the New York Regional Office, and his condition was diagnosed as follows: "Dementia praecox, mixed type, pronounced incompetent."

With respect to the economic history of the insured, it appears from the many social service reports made by the Veterans' Administration contained in the file relating to the economic history of the insured that he has been unable to pursue any gainful occupation since the date of the lapse of the policy by reason of non-payment of premium, and has never worked since such date up to the present time. It is significant to note that when the insured
81 was discharged from the Kings Park State Hospital, Kings Park, Long Island, to the custody of the committee on June 13, 1920, the hospital authorities then stated that vocational training would be of no benefit to the insured by reason of his mental condition.

With respect to his rating for compensation, it appears from the ratings for compensation purposes that the insured has been considered totally disabled for compensation purposes since April 25, 1920, the date of discharge, and while the policy was still in force, up to the present date. April 26, 1920 the Veterans' Administration rated the insured temporary total for compensation purposes from the date of discharge, and recommended that a committee be appointed.

Point Six

In view of the history of the insured since March 29, 1920, it appears reasonably certain that the insured will be unable to pursue any substantially gainful occupation for the balance of his life.

Point Seven

The impairment of the insured's mind since March 29, 1920 has been such that it has continuously rendered it impossible for him to follow any substantially gainful occupation, and is founded on conditions which render it reasonably certain that it will continue throughout his life.

In conclusion, I believe that I have demonstrated the following:

1. That the insured was in sound health prior to his enlistment, on the date of enlistment, and on the effective date of insurance.

82 2. That the insured has been premanently and totally disabled for insurance purposes from March 29, 1920 to date, and that it is reasonably certain that he will continue to be permanently and totally disabled for insurance purposes for the remainder of his life.

3. That these considerations must lead this learned Council to find that the insured is entitled to permanent and total disability benefits from March 29, 1920 to date, and in the future throughout the remainder of his life.

That is my argument.

I desire to submit a supplemental brief covering the activities of the insured prior to his enlistment.

Mr. MILLS. You have no other evidence as to the insured's impairment except what you refer to and what is in the folder, is that right?

Mr. RICHMAN. Yes, sir; that's right.

Mr. MILLS. (Note.) The affidavit of James J. Lowrey of October 13, 1934, and the additional brief referred to by Mr. Richman, are received and made a part of the record.

Is the insured still considered, at this time, mentally incompetent?

Mr. RICHMAN. Yes; by the doctors of the Veteran's Administration.

Mr. MILLS. He has been so considered all along, is that right?

Mr. RICHMAN. Yes, sir.

Mr. MILLS. Has he done any work since he came out of service?

Mr. RICHMAN. No, sir.

Mr. MILLS. Any questions, Dr. Chaney or Dr. Cooper?

83 Dr. CHANEY. No questions.

Dr. COOPER. No questions.

Mr. MILLS. We will review the evidence, Mr. Richman, and take into consideration what you have said, and when we have reached our conclusion we will notify you.

(Adjournment at 3:00 P. M.)

VETERANS' ADMINISTRATION,
INSURANCE CLAIMS COUNCIL,
Washington.

C-405,970

GARMES, WILLIAM,
JAMES J. LOWREY, *Committee,*
197 Leonard Street, Brooklyn, New York.

Supplemental statement made by Captain Fred Kochli, Disabled American Veterans of the World War, under date of October 22, 1934, by virtue of the fact that he was unable to attend the hearing in this case on October 19, 1934.

Supplementing Mr. Richman's presentation, there is nothing materially that I can add to the brief submitted by the attorney for the claimant's committee, Mr. Richman. I do, however, desire to con-

cur in his contentions that claimant has been permanently and totally disabled for insurance purposes from March 29, 1920 up to the present time. Without further argument, I believe the evidence of record is conclusive that the claimant was permanently and totally disabled before discharge from military service.

84 *Exhibit C, annexed to affidavit of Abraham Schwartz*

James J. Richman, Counselor at Law, 1482 Broadway, New York. Bryant 9—1334.

POWER OF ATTORNEY

Know all men by these presents that I, James J. Richman, residing at 881 Washington Avenue, Borough of Brooklyn, City of New York, representing James J. Lowrey, Committee of the person and property of William Garmes, an incompetent World War Veteran and holding power of attorney from James J. Lowrey, Committee, dated April 18, 1934, filed with the Director of Insurance, Veterans' Administration, Washington, D. C., on or about the 18th day of April 1934, do hereby appoint the Disabled American Veterans of the World War to prosecute claim for disability benefits before the Insurance Claims Council under the terms of a War Risk Insurance policy in the sum of Ten thousand ($10,000.00) Dollars issued to the said William Garmes, incompetent, by the United States government.

It is understood that no fee or compensation of whatsoever nature will be charged for the service rendered pursuant to this power of attorney and that this power of attorney may be cancelled by me on written notice to the Veterans' Administration.

Witness my hand and seal this 7th day of July 1934, at Borough of Manhattan, City of New York.

JAMES J. RICHMAN,
881 Washington Avenue, Brooklyn, N. Y.

85 In Supreme Court of New York, Kings County

Reply affidavit of James J. Richman, referred to in order of reference

STATE OF NEW YORK,
County of Kings, ss:

James J. Richman, being duly sworn, deposes and says:

1. I am the Attorney for the Petitioner and am submitting this affidavit in reply to the answering affidavit of the Veterans' Administration by Abraham Schwartz, sworn to August 12th, 1936.

2. The motion referred to in paragraph 3 of the answering affidavit by Abraham Schwartz was a motion pursuant to Section 1384–K of the Civil Practice Act for an order granting the Committee additional compensation for unusual and extraordinary services rendered by him to the Estate. The within motion is for an

order permitting the Committee to pay a fee to his Attorney for services rendered by the Attorney to the Estate. These two applications are entirely different in nature and should not be confused.

3. Counsel is unable to understand the use by Mr. Schwartz of the word "subterfuge" in connection with the within application. It is clearly an application by the Committee for permission to pay a fee to his Attorney for services rendered by his Attorney
86 to the Estate and cannot by any interpretation mean anything else. Annexed hereto is an affidavit by James J. Lowrey, Committee, sworn to August 14th, 1936, from which it appears that he is the sole heir at law and next of kin of the Incompetent; that he has no agreement with Counsel under which he is to receive any part of the fee allowed by the Court to Counsel, and that he feels that the sum requested by Counsel as a fee is fair and reasonable in view of the services rendered and the result attained.

4. Counsel has set forth in detail in his affidavit sworn to July 3, 1936, the services which he rendered and he respectfully contends that the successful termination of the claim in the face of two denials by the Veterans' Administration, especially in view of the fact that the claim was based on a contract of insurance which had lapsed by reason of the non-payment of premium in 1920, required both patience and skill. The Court should further consider the fact that the Incompetent did not receive any money by reason of his War Risk Insurance Contract until 14 years after he became entitled to the receipt of benefits thereunder. This result was accomplished solely through the efforts of your Deponent.

5. Up to the present time, Deponent has received no compensation whatsoever for the services rendered by him in connection with the insurance recovery.

6. In the affidavit sworn to by Mr. Schwartz, he places very great reliance on the case of In Re Shinberg, 238 App. Div. 74, and
87 the decision in Matter of Zadurian, 142 Misc. 24, Deponent does not deem it necessary to go into any extended discussion of these cases. Great reliance was placed on these authorities by the Veterans' Administration in the case of Hines v. Stein, which will be referred to in the memorandum of law to be submitted upon the argument of the motion. It was there contended by the Veterans' Administration that Section 500 of the World War Veterans Act of 1924 limited the fees payable to attorneys in these matters. The United States Supreme Court held unequivocally that Congress nowhere intended to interfere with the exclusive power of State Courts over the affairs of incompetents and that Section 500 did not place any such limitation on fees as contended for by the Veterans' Administration. The Shinberg case, therefore, does not represent the law any longer in view of the Stein decision. Mr. Schwartz is attempting to give Section 500 a construction entirely different from that which was placed on it by the Supreme Court.

7. Mr. Schwartz also refers to Section 201 of Public Act No. 844 of the 74th Congress, approved and enacted on June 29, 1936, which

he says "definitely undertakes to put limitation upon State Courts in respect to guardians, etc." The statute nowhere attempts to place any limitation on the power of the State Courts over the estates of the incompetents and does not change the effect of the Stein decision. Furthermore, all of the services performed by Deponent were rendered, and his right to compensation therefor became vested, almost two years prior to the effective date of the Act in question. The statute, therefore, cannot possibly apply to the situation at bar.

88 8. While the Service Organizations and the Red Cross do not charge fees for services rendered by them in certain types of cases involving veterans, the attorneys acting for them receive adequate compensation for their services. The fact that certain organizations do not charge for particular services rendered by them does not mean that an individual attorney should not be adequately compensated for services performed by him.

9. Mr. Schwartz attempts to create the impression that the United States Government made a gift of these monies to the Incompetent. Such is not the situation. The United States Supreme Court in the case of Lynch v. U. S., 292 U. S. 571, said "War risk insurance policies are contracts of the United States. As consideration of the Government's obligation, the Insured paid prescribed monthly premiums * * *. But the policies, although not entered into for gain, are legal obligations of the same dignity as other contracts of the United States and possess the same legal incidents * * *. On the other hand, war risk policies, being contracts, are property and create vested rights." The services rendered by Counsel were performed in connection with the prosecution of a claim arising out of a contract between the United States Government and the Incompetent. The considerations applicable to any contractual obligation apply here with the same force and effect.

10. Counsel admits that at one time in the proceedings he called upon the Washington office of the Disabled American Veterans

89 of the World War, a Service Organization, for information contained in the insurance records of the Veterans' Administration located in Washington, D. C. Counsel also requested two attorneys, friends of his, on different occasions, who were going to Washington on other business to secure certain information from the Veterans' Administration relating to the Incompetent's insurance claim. It is submitted that Counsel should not be penalized for using all available means in protecting the interests of the Incompetent.

11. In view of the foregoing, Counsel respectfully urges this Court to grant the prayer contained in the petition.

JAMES J. RICHMAN.

Sworn to before me this 15th day of August 1936.

HENRY HALPERN,
Notary Public, Kings County.

Commission Expires March 30, 1938.

In Supreme Court of New York, Kings County

Reply affidavit of James J. Lowrey, referred to in order of reference

STATE OF NEW YORK,
County of Kings, ss:

James J. Lowrey being duly sworn, deposes and says:

90 1. I am the Petitioner and Committee of the Person and Property of the Incompetent and am submitting this affidavit in reply to the answering affidavit of the Veterans' Administration by Abraham Schwartz, sworn to August 12th, 1936.

2. I retained James J. Richman, attorney, to protect whatever rights the Incompetent had under the contract of insurance and I am anxious that he should receive a reasonable fee in view of the substantial services which he rendered and the satisfactory result attained.

3. I have no agreement with him as to a division of his fee with me or otherwise.

4. I am convinced that except for Mr. Richman's patience, skill, and ability, this claim would never have been paid.

5. I am the sole heir at law and next of kin of the Incompetent and I am advised that if the Incompetent predeceases me, I shall inherit his entire Estate. In spite of this fact I am satisfied that the Court should allow the fee requested, for there is no doubt in my mind that the services are worth it.

6. In view of the foregoing I respectfully urge this Court to grant the prayer of the petition permitting me to pay him the fee requested.

JAMES J. LOWREY.

Sworn to before me this 14th day of August 1936.

THERISA K. BIRKENKOPF,
Commissioner of Deeds.

Kings Co. Clk's No. 59, Reg. No. 7053.

91 In Supreme Court of New York, Kings County

Second answering affidavit of Abraham Schwartz, referred to in order of reference

STATE OF NEW YORK,
County of New York, ss:

Abraham Schwartz, Attorney for the Veterans' Administration, being duly sworn deposes and says:

In answer to the Reply Affidavit, verified August 14, 1936, by James J. Lowrey, Committee of the person and property of William Garmes, the incompetent herein, and to the accompanying Reply Affidavit, verified August 15, 1936, by James J. Richman, Esq., Attorney for the petitioning Committee herein, your deponent respectfully submits:

With reference to the contention made in paragraph 6 of Attorney James J. Richman's affidavit of August 15, 1936, herein referred to, wherein reference is made to the decision of the Supreme Court of the United States in Hines v. Stein, 80 L. Ed. 707, your deponent desires to point out that while such decision might be construed as authority for holding that no Federal Statute limiting Attorney's fees has any application to a State Court in guardianship matter, that, distinction can be made between Section 500 of the World War Veterans' Act, as amended, and those Laws and Regulations
92 construed in the decision aforementioned. In Section 500, there is positive statutory direction as to the amount and mode of payment of attorney's fees; whereas, in the Stein case the matter was governed by Veterans' Administration regulations promulgated pursuant to general statutory authority. It is desired to point out further that notwithstanding any action which might be taken by a Probate, or State Supreme Court pursuant to the Stein decision in permitting the guardian to pay such fees to his attorney, as the Court may deem just and reasonable, it is, nevertheless, a violation of Section 500 of the World War Veterans' Act, as amended, for an attorney to receive more than ten dollars, not for disbursements incurred, but as a fee for services rendered in an insurance claim, or where suit is instituted, any amount other than such sum as the Court may determine and allow, not to exceed ten per cent of the amount recovered to be paid by the Veterans' Administration out of the payments to be made under the judgment or decree as prescribed thereon. A further distnction between the Stein case adn the one at bar, is that in the Stein case the Veterans' Administration conceded that the $100.00 fee awarded by the Probate Court of Pennsylvania, to the Attorney for the petitioning guardian for his services and expenses in making a trip to represent her claim as guardian for the ward's estate before the Board of Veterans' Appeals of the Veterans' Administration, was not unreasonable, if such services were rendered other than in the prosecution of a claim before the Veterans' Administration.
In the proceedings at bar, the Veterans' Administration is ob-
93 jecting to the unreasonableness of the fee requested by Attorney James J. Richman for the settlement of a claim on behalf of the Committee for an award of government insurance which was allowed and not contested by the Veterans' Administration, without litigation or suit.

Your deponent respectfully calls this Court's attention to the fact that Section 201 of Public Act No. 844 of the 74th Congress, which went into effect and was approved June 29, 1936, is supplemental to Section 500 of the World War Veterans' Act, 1924, as amended. In this connection it is noted from the decision in the Stein case, Mr. Justice McReynolds, delivering the opinion of the court, stated:

"It is true that the provisions cited place general restrictions upon the fees of attorneys in connection with pension matters and prescribe the method of payment. But we find nothing in any of these Acts of Congress which definitely undertakes to put limitation upon

state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them. Conflict in respect of such matters between state courts and the federal government, its officers or bureaus would be unseemingly, perhaps extremely, unfortunate. And in the absence of compelling language, we cannot conclude that there was intention to create a situation where this probably would occur."

However, this situation was definitely met and removed all doubt by the enactment of the provision contained in Section 201 of
94 Public No. 844 of the 74th Congress, passed June 29, 1936, and which is fully set forth and quoted in your deponent's Answering Affidavit in this proceeding, verified August 12, 1936.

It is further believed that a distinction can be made between said Section 500 and the Laws and Executive Orders which were directly construed by the court in said case, particularly with respect to the limitations on attorney fees in claims or suits for insurance, in that the hearings and debates on Section 13 of the War Risk Insurance Act, together with the committee reports thereon specifically show the Congressional intent that under no circumstances was an attorney to receive any fee in connection with a claim for insurance other than as provided therein, said section 13 being later amended and becoming Section 500 of the World War Veterans' Act amendment of March 4, 1925. Excerpts from such debate (pages 5220–26, Congressional Record, House, April 17, 1918, Volume 56, Part 6) will be hereinafter quoted.

With respect to the reference made to the Shinberg case, your deponent desires to point out that the Court there held that it had no power to award any portion of the War Risk Insurance to the Attorney for the committee of the incompetent, in view of the emphatic language of the Statute. "See in re Shinberg's Estate, 238 App. Div. 74, 263 N. Y. S. 354." In Shinberg v. United States, 3 F. Supp. 327, the District Court, E. D. N. Y. concurred in these views.

Answering the contention contained in paragraph 7 of Attorney James J. Richman's reply affidavit of August 15, 1936, your deponent respectfully desires to point out that Section 201, Public Act
95 844 of the 74th Congress, approved and enacted on June 29, 1936, is controlling in the present situation and does apply for the reason that the present application for an allowance of counsel's fees to James J. Richman, as a result of the settlement of the Committee's claim for an award of Government Insurance for the benefit of the incompetent veteran herein, is being made after the passage of said Federal Statute.

With respect to paragraph 8 of Attorney James J. Richman's Reply Affidavit of August 15, 1936, your deponent again desires to point out that inasmuch as Mr. James J. Richman is himself a Pension Attorney, admitted to practice before the bar of the Vet-

erans' Administration and presumed to be well informed and acquainted with the Federal Statutes and Veterans' Administration regulations covering the mode and payment and limitation of fees authorized by Congress, his statement: "The fact that certain organizations do not charge for particular services rendered by them does not mean that an individual attorney should not be adequately compensated for services performed by him," is untenable.

Incidentally, at this point your deponent respectfully calls this Court's attention to the debate held in the House of Representatives on the subject entitled "Soldiers' Insurance—Attorneys' Fees," as reported in the Congressional Record, Vol. 56, Part 6, pp. 5220-5226, April 17, 1918, which resulted in the enactment of Public Act 151, 65th Congress (H. R. 11245, May 20, 1918). H. R. 11245 was a bill to amend the act entitled "An act to authorize the establishment
of a Bureau of War-Risk Insurance in the Treasury Depart-
96 ment" approved September 2, 1914, and an act in amendment thereto, approved October 6, 1917.

The reference to this Federal legislation is respectfully made for the purpose of pointing to the history and origin of Section 500 of the World War Veterans' Act, which in turn resulted in the enactment of Section 201 of Public Act 844 of the 74th Congress as aforementioned. A reading of the minutes of the Congressional debate dealing with the subject of fees to attorneys in connection with the prosecution of claims on behalf of veterans for awards of Government Insurance will disclose the clear intent, on the part of the framers of this legislation, to bring about the enactment of legislation whereby a deserving veteran will receive the full benefit of an award of Government Insurance to which he may be entitled, without having any substantial part thereof diverted by the intervention of claims, agents, or attorneys in the prosecution of such claims, thus avoiding a needless expense to the veteran claimant. In the Congressional debate just referred to, we find the following which are typical expressions of the members of the committee herein:

* * * * * * * *

"Mr. RAYBURN. The only reason on earth for the introduction and report of this bill and the asking for its consideration is that since the passage of the war-risk insurance act, like what happened under the pension act to some extent, organizations of lawyers have been formed from one end of this country to the other, so-called lawyers who have been preying upon the ignorance of the people who are the beneficiaries of the act for insurance, compensation, and allot-
ments.
97 "Mr. MOORE of Pennsylvania. That ought to be stopped.

"Mr. RAYBURN. That is exactly what we are trying to stop, and that is the only thing this bill seeks to do.

"Mr. MOORE of Pennsylvania. The bill provides a method of compensation, but some gentlemen are of the opinion that there should be no compensation at all."

* * * * * * * *

"Mr. THEADWAY. Mr. Speaker, I shall endeavor to explain such features of the bill as any Member of the House may desire to inquire about, and will yield for any questions that may be asked.

"The reason for the introduction of this measure is very plain. I desire to call attention to a sentence in Section 13 of the war-risk insurance act approved October 6, 1917, which reads as follows:

"'The director shall adopt reasonable and proper rules to govern the procedure of the divisions, to regulate the matter of compensation, if any, but in no case to exceed 10 per cent, to be paid to claim agents and attorneys for services in connection with any of the matters provided for in articles 2, 3, and 4.'

* * * * * * * *

"Now, let me explain to you exactly what has happened. The same explanation appears in the report of the committee on this bill. During the period when the casualty lists were published and the names of the next of kin of those injured or killed in the
98 service were printed with the addresses these so-called claim agents took those addresses and at once communicated with the beneficiaries under the law. I hold in my hand a set of papers which was sent me by the town clerk of one of the towns in my district, who brought the matter to my attention. This is the form in which the claim agents sent out the papers, giving them power of attorney and agreement as to attorney's fees, and a form of printed letter of which I want to read one sentence; and, by the way, I will state that this letter is addressed to the mother of one of the first soldiers from my district killed in the war. This is the sentence to which I desire to call the particular attention of the House: 'Of course, you understand that in a claim of any sort against the Government, no officer or agent of the Government can render the claimant the aid and counsel an attorney can * * *'

"And so forth. In other words, this claim-agent concern here says that it can do better service for the beneficiaries under the war-risk insurance act than can any officer or agent of the Government. Was there ever a more deceiving communication put into the hands of friends and bereaved relatives than such a letter as that?"

* * * * * * * *

"Mr. THEADWAY. The department is very anxious to have word reach all beneficiaries that there is no need for the employment of these claim agents, and notice has been sent to them to that effect; but in numerous instances, as, for instance, in the case of the
99 loss of the Tuscania, the department has record of relatives of people on the Tuscania whose lives were saved being put to the excruciating pain and suffering of being notified by these claim agents that their relatives and next of kin were lost, whereas they were actually saved. These people have been so solicitous for their business that they have even gone to the extent of notifying the next of kin of an entire shipload being lost, when half or more of them were saved. The Adjutant-General's Office informed me that it had referred three telegrams of that nature to the Department of

Justice in order to prosecute these claim agents for misrepresentation and the injury to the feelings of relatives that naturally would result.

"Now, Mr. Speaker, Congress and the Government are back of the boys in the trenches and back of their friends and families. [Applause.] To my mind no better piece of legislation, no more humanitarian piece of legislation has ever been put on our statutes books than this war-risk insurance act. It will make the people at home feel better toward the Government that is calling out their young men and asking those men to make this supreme sacrifice. It will make the young men feel better to realize that the Government stands back of and is willing to assist the ones they are leaving behind by such humanitarian legislation at this.

"It is not the intent of Congress that these mercenary claim-agent leeches should sap the blood of any financial benefit from the
100 Government by putting up these false claims and establishing their right to this 10 percent commission for doing nothing and doing what the Government itself intends to do in every individual case.

"Mr. Speaker, I do not feel that there is occasion for me to go into detailed explanations. I think I have stated the case as it is, and I heartily cooperate with the Gentlemen who have prepared this particular bill, which, as I have stated, is the result of the original one that I introduced some time ago. The time to check this evil is in its beginning and not wait to have it reach the scandalous proportions of the pension claims. I should be very glad, if my time permits, to answer any questions bearing on the subject. If there are none I will yield back the balance of my time."

* * * * * * *

"Mr. TREADWAY. I will call the gentleman's attention to a further provision on page 2:

"Except that in the event of disagreement as to claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder, an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision, the court, as part of judgment shall determine and allow such reasonable attorney's fees, not to exceed 10 per cent of the amount recovered, to be paid by
101 the claimant in behalf of whom such proceedings were instituted, to his attorney."

* * * * * * *

"Mr. SNOOK. Mr. Speaker and gentlemen of the House, the original bill to which this is an amendment, as the gentleman who has just preceded me has well said, is one of the most important features of constructive legislation passed by this Congress. Soon after the passage of that bill it came to the attention of the committee that

a gross abuse was likely to spring up through attorneys who congregated here in Washington, sending out these powers of attorney and contracts to which the gentleman from Massachusetts has called attention, getting claimants to sign the contracts and filing them with the department, and thereby drawing a fee where they had rendered no services to the claimant. It is the old policy followed during the days of pension legislation. These people have grown adept in that business. In those days a great deal of money was made by people who rendered no services to the soldier, and so this amendment has been drawn to cut off such contracts.

"It will be remembered by Members of the House that articles 2, 3, and 4 of the original act, each one, had a separate purpose. The first provided for the allotment, the second for compensation, and the third for insurance.

"Now, this bill is so drawn, or is intended to be so drawn, that these attorneys cannot collect a fee for services in any one of
102 these cases, except under regulations to be formulated and promulgated by the Bureau of War-Risk Insurance. It was suggested to the committee, however, that it might be necessary, and probably was necessary, that some compensation should be allowed to some one for preparing the papers for applicants and so the fee for that purpose was fixed in the bill at $3. You will find this provision in the first paragraph of the bill, at the top of page 2, under which all persons in the country may go to a justice of the peace, or an attorney, and have an affidavit prepared."

In view of your deponent's Answering Affidavit of August 12, 1936, as well as the foregoing, your deponent again respectfully urges this Court to disregard in its entirety any claim on the part of the Committee and his attorney for any funds out of this estate in excess of $10.00 on the ground that this application is simply a subterfuge to obtain by indirect methods monies out of the estate of an incompetent which could not be obtained directly.

ABRAHAM SCHWARTZ.

Sworn to before me this 18th day of August 1936.

JAMES A. HEVERIN,
Notary Public.

Bronx Co. No. 51, Reg. No. 51H38. Cert. filed in N. Y. Co. No. 372, Reg. No. 3H195. Commission expires March 30, 1938.

103 In Supreme Court of New York, Kings County

Second replying affidavit of James J. Richman, referred to in order of reference

STATE OF NEW YORK,
County of Kings, ss:

James J. Richman, being duly sworn deposes and says:

1. He is submitting this affidavit in answer to the affidavit submitted by the Veterans' Administration by Abraham Schwartz sworn to August 18, 1936.

2. Section 201 of Public Act No. 844 of the 74th Congress approved June 29, 1936, nowhere places any limitation upon the exclusive power of State Courts to control the administration of the estates of Incompetents. Assuming, but not conceding, (1) that Congress in passing Section 201 intended to control the exclusive power of a State Court to fix the fees allowed to an Attorney for services rendered to the estate of an Incompetent, and (2) that Congress intended that Section 201 should be retroactively applied in fixing fees for services rendered and completed by Attorneys before the effective date of the Act in question, such an Act would be unconstitutional, first, because it would constitute an unlawful interference by Congress with the exclusive rights and powers of a State Court over the affairs of Incompetents, and second, because by attempting to abridge vested rights the statute would violate the due process clause of the 5th amendment to the U. S. Constitution. In 12 Corpus Juris 957, the following appears:

104 "The 5th amendment to the Constitution of the United States which provides that no person shall be 'deprived of life, liberty or property without due process of law' secures the individual against any action of the federal government divesting vested rights." (See Untermyer v. Anderson, 276 U. S. 440.)

3. Deponent submits that the excerpts from the discussions in Congress which appear on pages 5 to 7 of the affidavit of the Veterans' Administration by Abraham Schwartz sworn to August 18, 1936, are totally irrelevant. The evils pointed out in the debates referred to cannot possibly apply to an Incompetent's estate where every disbursement is subject to the careful scrutiny and approval of the Court after notice to all necessary parties including the Veterans' Administration. These considerations were called to the attention of the Supreme Court of the United States in the Stein case, and they were disposed of by Mr. Justice McReynolds in the following language:

"The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries against extortion, imposition, or fraud. Calhoun v. Massie, 253 U. S. 170, 173. Dangers of this character are not to be expected in connection with the orderly exercise of authority by State Courts over appointees properly entrusted with pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought."

105 4. The Supreme Court of the United States having used this language in connection with the allowance of a fee to an Attorney for legal services rendered to an Incompetent's estate involving a claim for pension which is a gratuity, it would most certainly take the same position with regard to similar services rendered in connection with an insurance claim which is based on a contract.

5. In view of the foregoing, Deponent respectfully urges that the prayer contained in the petition be granted.

JAMES J. RICHMAN.

Sworn to before me, this 20th day of August 1936.

HENRY HALPERN,
Notary Public, Kings County.

In Supreme Court of New York, Kings County

Third answering affidavit of Abraham Schwartz, referred to in order of reference.

STATE OF NEW YORK,
County of New York, ss:

Abraham Schwartz, Attorney for the Veterans' Administra-
106 tion, being duly sworn, deposes and says:

Your deponent respectfully submits this affidavit in answer to the "Second Reply Affidavit," verified August 20, 1936, by James J. Richman, Esq., Attorney for the petitioning Committee herein.

Mr. Richman erroneously assumes that Congress intended that Section 201, Public Act 844 of the 74th Congress, should be retroactively applied in fixing fees for services rendered and completed by attorneys before the effective date of the Act in question. In this connection, the Court's attention is invited to the last paragraph appearing on page three of your deponent's affidavit verified August 13, 1936, filed in this proceeding, wherein it was indicated that Section 201 of Public Act 844, approved and enacted on June 29, 1936, is controlling in the present situation and does apply for the reason that the present application for an allowance of Counsel's fee to James J. Richman has been filed with this Court after the passage of said Public Act 844; namely, on August 17, 1936. (See Notice to Motion, dated August 1, 1936.) Sec. 201 is supplemental to Section 500 of the World War Veterans' Act, amended.

Your deponent further informs this Court that the following recital appears on every type of Government life insurance policy, constituting a part of the contract of insurance: "This insurance is granted under and subject to the provisions of the War Risk Insurance Act and amendments and supplements thereto."

107 In the case of the United States v. Jeremiah Hall, 98 U. S. 343, 25 Law Ed. 180, the Court, after extensive consideration of the rights and responsibilities of the Federal Government with respect to the distribution of pension funds, said:

"* * * the United States, as the donor of the pension, may, through the Legislative Department of the Government, annex such conditions to the donation as they see fit, to insure its transmission unimpaired to the beneficiary * * * the Guardian no more than the agent or attorney of the pensioner is obliged by the laws of Congress to receive the funds; but if he does, he must accept it subject to the annexed conditions * * * the fund proceeds from the

United States and inasmuch as the donation is a voluntary gift, the Congress may pass laws for its protection, certainly, until it passes into the hands of the beneficiary * * * elements of the offense defined by the Act of Congress in question consist of the wrongful acts of the individual named in the indictment wholly irrespective of the duties devolved upon him by the State Law * * * that a guardian appointed under state authority to whom pension money was paid, is nothing more than an agent for the government, and that money in his hands is still under its control and management." See also Manning v. Spry, 121 Iowa, 191, 96 N. W. 873, at page 875, and United States v. Ryckman, 12 Fed. Rep. 46.

Page 48.

108 What the Court said in the case of United States v. Jeremiah Hall, supra, with reference to disability pension funds which is considered a gratuity, applies with equal force to funds so to be withdrawn in connection with Government insurance claim. This is so, even though while it might be regarded that the insurance claim is based upon a contract, it takes on the semblance and nature of a gratuity on the part of the Government, since it is a known fact that Government insurance is purchasable and issuable by and to a restricted class; namely, honorably discharged veterans and at a reduced rate of premiums, which is made possible by the absence of excessive administrative expense.

In view of the foregoing, your deponent again respectfully urges this Court to disregard in its entirety any claim on the part of the Committee and his attorney for any funds out of this estate in excess of $10.00 on the ground that this application is simply a subterfuge to obtain by indirect methods monies out of the estate of an incompetent which could not be obtained directly.

ABRAHAM SCHWARTZ.

Sworn to before me, this 20th day of August 1936.

JAMES A. HEVERIN,
Notary Public.

109 In Supreme Court of New York, Kings County

Minutes of hearing before official referee, in support of motion

Before: Hon. JAMES C. VAN SICLEN, Official Referee

BROOKLYN, N. Y., *January 4, 1937.*

Appearances: James J. Richman, Esq., Benjamin C. Ribman, Esq., Attorneys for plaintiff; James A. Clark, Esq. (Abraham Schwartz, Esq., Of Counsel), Attorney for defendant.

Motion to dismiss

Mr. SCHWARTZ. If your Honor please, I appear for the Veterans' Administration, and desire to make a motion to dismiss this hearing

at this time on the ground that I think the decision of Mr. Justice Thomas C. Kadien fails to dispose of the question raised by the Veterans' Administration in opposing this application as to whether or not the Attorney, James J. Richman, appearing for the Petitioner-Committee herein, for an order fixing his fee, is entitled to the sum of $5,000 as a fee that he asks for, or whether or not he, as an Pension Attorney, admitted before the Bar of the Veterans' Ad-
110 ministration in the prosecution of claims for incompetent veterans, should be restricted to a statutory fee amounting to not more than $10 in accordance with Section 500 of the World War Veterans' Act of 1924, as amended by Section 200 & 201 of Public Act No. 844 of the 74th Congress.

The REFEREE. I refuse to rule on the motion as it is not before me, and give you an exception.

JAMES J. LOWREY, being duly sworn, testified, as follows:

Direct examination by Mr. RICHMAN:

Q. Where do you live?—A. 197 Leonard Street, Brooklyn.

Q. Mr. Lowrey, you are the Committee of William Garmes, an incompetent?—A. Yes, sir.

Q. You are the Committee of both his person and his property?—A. Yes, sir.

Q. You are also sole known next-of-kin of the incompetent?—A. Yes, sir.

Q. You are a brother of half blood?—A. Yes.

Q. On or about April 21, 1934, did you retain me to prepare your annual inventory and account as Committee?—A. Yes, sir.

Q. In the course of our conversation with respect to that account did I ask you concerning the status of the war risk insurance contract issued to the incompetent by the United States government?—A. Yes.

Q. What did you advise me with respect to that insurance?—A. I said his insurance was lapsed in 1919.

111 Q. What did I say to you?—A. You said you would charge to take the matter up.

Q. This insurance was a $10,000 war risk term insurance which had lapsed by reason of the non-payment of premiums due in the year 1920?—A. Yes, sir.

Q. Which provided for disability at the rate of $57.50 per month?—A. Yes.

Q. Did I thereafter suggest that the incompetent might have certain rights under that policy?—A. Yes.

Q. And did you thereafter retain me to protect whatever rights the incompetent had?—A. Yes, sir.

Q. On that day did we enter into a retainer arrangement?—A. Yes, sir.

Q. Did you sign the retainer?—A. Yes, sir.

Q. I show you this paper and ask you whether the signature which appears thereon is yours?—A. Yes, sir.

Mr. RICHMAN. I offer it in evidence.

Admitted in evidence and marked "Ex. 1."

Q. Thereafter did you appear at my office on a number of occasions together with all your records relating to the Estate?—A. Yes, sir.

Q. Did you and I go over all your papers and did I question you concerning the history of the incompetent prior to his enlistment in the service?—A. Yes.

Q. Did I prepare a number of papers in connection with the insurance, which you signed?—A. Yes.

Q. And thereafter did you receive a check from the Treasurer of the United States in the sum of $10,235?—A. Yes, sir.

112 Q. Representing the accumulated disability benefits?—A. Yes.

Mr. SCHWARTZ. Objected to, the term "Accumulated disability payments."

The REFEREE. Yes; that part is out. He received $10,000 from the United States Treasurer. The rest is out.

Q. You recall, Mr. Lowrey, that after we had our conferences, and after you had signed these papers which I had prepared, I went to Washington?—A. Yes, sir.

Q. After I returned from Washington I advised you that the matter had been argued and that in due course a decision would be rendered?—A. Yes, that is right.

Q. After you received this check in the sum of $10,235 you received a check in the sum of $57.50 each month thereafter?—A. Yes, sir.

Q. And you are still in receipt of $57.50 per month?—A. That is right.

Q. Recently when I prepared certain papers which you signed in connection with the application for a fee, which is now before the Court, you read and signed the petition which I prepared for you, is that right?—A. Yes, sir.

Q. And also the affidavit which I prepared for myself —A. Yes.

Q. And you know that I am now seeking a fee in the sum of $3,000?—A. Yes, sir.

Q. You are satisfied that that is a fair and reasonable fee for the services which I rendered in connection with this insurance?—A. Yes. There was a lot of work to it.

Mr. SCHWARTZ. I don't think that is competent for him to

113 pass on whether that is a fair and reasonable fee.

The REFEREE. He wouldn't sign the petition, I presume, unless he thought it was. I don't care what his opinion is.

Cross examination by Mr. SCHWARTZ:

Q. Mr. Lowrey, you were just told by your counsel that he appeared for you on or about October 16, 1934, before the Insurance Counsel of the Veterans' Administration in Washington. He didn't mention the exact date but he told you that he appeared before that Board on behalf of your benefit as Committee in connection with the prosecution of the insurance benefit, is that right? A. Yes.

Q. Did you accompany him at that hearing in Washington?—A. No, sir; I wasn't.

Q. As far as you know the only one who appeared before the Board was your attorney, Mr. James J. Richman, is that right?—A. That is all I know, I wasn't there, I am sure I had no money to go anywhere.

Q. Did you delegate anyone else other than Mr. James J. Richman to appear for you?—A. No.

Q. As far as you know nobody else but Mr. Richman was there before that Government board in Washington; is that right?—A. Yes, sir.

By the REFEREE:

Q. Have you got the fund invested?—A. Yes, sir.

Q. The whole $10,235 you have invested?—A. I haven't got
114 it all invested; I invested $4,500 in Government bonds, and I have others invested in the Prudence; $3,000 invested in the Prudence, and there is $1,500 invested in the Guarantee Mortgage Co., but that isn't out of the $10,235. There is only $4,500 out of that invested, out of the $10,000.

Q. What has become of the other $6,000?—A. That is in the bank.

Q. That is better than Prudence and Guarantee Mortgage?—A. Yes, sir.

Q. That is in what banks?—A. I got it in the Brooklyn Savings Bank.

JAMES J. RICHMAN, being duly sworn, testified as follows:

Direct examination by Mr. RIBMAN:

Q. Where do you live?—A. 881 Washington Avenue, Brooklyn.

Q. You are an Attorney and Counselor at Law?—A. Yes, sir.

Q. How long have you been admitted to practice in the State of New York?—A. Approximately ten years.

Q. You were formerly in my office?—A. Yes, sir.

Q. Prior to your admission, and a short time thereafter?—A. Yes.

Q. In my employ?—A. Yes, sir.

Q. Are you the attorney for the Committee in this proceeding?—A. Yes.

Q. How long have you acted in that capacity?—A. Since 1934.

Q. Has your practice during the past several years been
115 more or less confined to the field of representation of incompetents in veterans' matters?—A. Yes.

Q. Mr. Lowrey, the last witness, testified that in April 1934, you had a conversation with him about a certain war risk policy that had been issued to the incompetent by the United States Government?—A. Yes, sir.

Q. Was that information adduced by you as a result of questioning Mr. Lowrey, or did he volunteer it himself?—A. In the course of our conversation with respect to the annual account I questioned him as to whether or not a War Risk Insurance contract had ever been issued to the incompetent, and he replied that it had been but had

lapsed in 1920 shortly after the incompetent was discharged from the service and was no longer in force.

Q. That information you received as a result of questioning Mr. Lowrey?—A. Yes.

Q. Did he tell you whether anything had been done from the time of the lapsing of that policy in 1920 down to the time that you refreshed his recollection about it, in respect to endeavoring to reinstate that policy?—A. He advised me that it had lapsed, and as far as he knew it was dead for all purposes.

Q. Thereafter, as a result of the conversation, you then had Mr. Lowrey sign this retainer which is marked "Ex. 1"?—A. Yes, sir.

Q. Tell his Honor what services you rendered after this retainer was signed?—A. On or about April 1934, I wrote a letter to the Veterans' Administration, Washington, D. C., requesting information concerning the status of the war risk insurance policy issued to the incompetent, and under date of April 19, 1934, the Vet-
116 erans' Administration advised me as follows: "The above named veteran went into the military service and applied for $10,000 war risk term insurance, which he permitted to lapse owing to the non-payment of premium due May 1st, 1920. In accordance with the Act of March 20, 1933, and the amendments thereto, insurance benefits are not payable in this instance and cannot be considered by this Administration at the present time." Subsequently, as a result of a further communication by me, the Director of Insurance, under date of April 27, 1934, advised me, as follows: "Under Public Act No. 2, 73rd Congress, this Administration has no authority to give consideration to any claim on war risk term insurance. It will therefore not be possible for this Administration to now consider the claim for insurance benefits on war risk term insurance."

Despite these two denials I felt that the incompetent might have certain rights so I made a very thorough analysis of all legislation relating to war risk insurance from October 1917, the date of the original act, to date. I examined very carefully the following statutes. Public No. 90, 65th Congress, approved October 6, 1917; amendment to War Risk Insurance Act; Public No. 242, 68th Congress, approved June 7, 1924; World War Veterans' Act of 1924.

Mr. SCHWARTZ. From what you are reading, do you want to tell us that you examined all of these pieces of legislation?

The WITNESS. Yes.

Mr. SCHWARTZ. Is it part of the moving papers. I think your Honor will have recourse to that.

117 The REFEREE. I don't have recourse to anything. If you come in here you give your testimony and I decide the issue. If he is going to establish his right to a fee he will tell me how much work he did.

Q. I think, as you go along, you might mention for the record the number of hours that you put in on each day, if you have a schedule of that annexed to the papers?

The REFEREE. You don't need to tell me what the schedule is.

A. Thereafter I examined the decisions in the Federal Courts relating to War Risk Insurance, and a list of those decisions appeared in the moving papers. I made a very exhaustive analysis of the medical, social, economic, and compensation history of the incompetent from the date of his discharge from the service to date, based on the records relating to the incompetent in the Veterans' Administration, and folders and papers on file in the office of the County Clerk of Kings County, voluminous records relating to the Estate in possession of the Committee, and on information elicited from the Committee during numerous conferences had with him relating to the history of the incompetent. I prepared a claim and a supplemental brief, and certain supplemental affidavits, all of which were filed with the Veterans' Administration. I retained the services of Dr. William Schick a psychiatrist and neurologist on the staff of the Neurological Institute, Montifiore Hospital, College of Physicians & Surgeons, Columbia University, and I obtained statements
118 from him based on a hypothetical question as to whether or not the incompetent was permanently and totally disabled when his policy lapsed.

The REFEREE. In other words, to reinstate this policy you had to prove that the time had elapsed, that the statute did not hold against him, and he was unable, on account of mental disability, to pay the insurance?

The WITNESS. That is that the policy did not lapse but matured by reason of the happening of the contingent disability.

The REFEREE. For all that how long did you take?

(Witness continuing.) Thereafter the claim was set down for hearing, and I appeared before the Veterans' Administration in Washington, and I argued the claim. Thereafter they granted it and the sum of $10,235 was paid, representing disability benefits at the rate of $57.50 per month from March 1920, to December 1934, a period of 178 months.

Q. When was that payment made?—A. That payment was made on or about February 1st, 1935.

The REFEREE. Is this $10,000 the result of the $10,000 policy, or is it the result of the accumulated non-payments under the disability clause of the policy?

The WITNESS. It represents the accumulated disability benefits at the rate of $57.50 per month.

119 The REFEREE. And the mere fact that it is a $10,000 risk, and the amount recovered is practically the same, has no relation at all?

The WITNESS. Correct. This incompetent will be in receipt of $57.50 per month as long as he lives and is permanently and totally disabled. I want to emphasize that this matter was especially difficult for the reason that there was no contract, and the job to determine the contract was unusually difficult because no policy was ever issued to the incompetent. On the effective date of the insurance, on July 26, 1918, the insured was advised that his life was insured

against both total and permanent disability in the sum of $10,000, and later by regulation permanent disability was defined.

Q. When you say there was no contract, you mean there was no physical document in possession of the incompetent which was turned over to you?—A. That is right.

Q. In other words he had the benefit of this $10,000 insurance as a result of regulations and statutes enacted by government officials?—A. Yes, sir.

The REFEREE. That was quite a common occurrence, many of them were incompetent to handle their policy, or even take care of it?

The WITNESS. As I understand it during the war certificates weren't issued, or if they were issued they were either lost—
120 especially in the case of an incompetent, it naturally would get away from him.

Mr. SCHWARTZ. I object to certificates being lost, that isn't a definite answer, the witness isn't in a position to state.

The REFEREE. Overruled and I will give you an exception.

Q. In all how many hours did you devote to this?—A. Altogether 200 hours were consumed by me in the preparation and presentation of the claim.

Q. How much time did you spend in Washington?—A. I spent about a day or two; a day and a half. This matter came up for consideration by Thomas O'Rourke Gallagher, Referee in Incompetency, and he issued a report in which he stated at page 8 of the report dated May 28, 1935, "Re: Insurance"——

Mr. SCHWARTZ. I object to any part of this proceeding.

The REFEREE. I want to hear from Mr. Gallagher.

(Witness continuing.) "The Committee made application, for payments under this policy, this application, was denied on the ground that the policy had lapsed for non-payment of premiums, and due to the enactment of the economy bill could not be reinstated and payments could not be made. The Committee retained counsel in this matter, the above named Mr. Richman, and through his efforts payments were not only resumed under this policy but back payments were made from March 20, 1920, at the rate of $57.50 per month, a total, during this period, of $10,235." And, further, "Which
121 insurance, in all probability, this Estate would have never received except for the efforts of Committee and counsel." There is attached to the moving papers a copy of my register in which I recite my activities in this action each day and the hours which I spent.

Q. And those hours total 200?—A. And those hours total 200 hours.

Q. When was that check issued?—A. February 1, 1935.

Q. Has the Committee been receiving $57.50 monthly, since the issuance of that check, from the government?—A. Yes.

Q. Did you make any investigation as to what the normal expectancy of life of the incompetent was?—A. Yes, sir.

Q. What was the result of that?—A. It appears from the American Experience Table of Mortality that the insured's expectancy is 24½ years.

Q. According to the records, according to your investigation, what is the state of this incompetent's mental condition at this time?—A. His condition has been diagnosed as dementia praecox, incurable.

Q. On the basis of his normal expectancy of 24 years plus, at the rate of $57.50 a month, how much would the Estate receive?—A. $13,340.

Q. Which, added to the $10,235 mentioned, makes a total of how much?—A. If I may correct you. The sum of $13,800 will be paid in any event, which will consist of 240 payments at $57.50 a month over a period of twenty years. That is fixed.

Mr. SCHWARTZ. I say it is not fixed.

The REFEREE. You can cross-examine him.

122 Q. Mr. Richman, based on your experience with matters of this sort, taking into consideration the services that you rendered here, and the results accomplished, what do you estimate is the reasonable value of the services rendered by you?—A. I estimate that the reasonable value of my services is $3,000 and I estimate it on this basis: That this incompetent will receive during the life of this policy, and if he lives out his expectancy, a total of $27,140 representing the disability benefits, and will also receive the benefit of premium waivers amounting to $3,876, with the result that the total enrichment to this Estate will amount to $31,016. I desire to point out at this time that the fee requested is less than the saving in premiums by reason of the waiver of premiums. There was a matter some years ago in the courts of California in which the attorney was allowed $4,000 for services much less than the ones I rendered.

Mr. SCHWARTZ. That is his opinion.

The REFEREE. Have you received anything?

The WITNESS. No, sir.

The REFEREE. Have you had any disbursements?

The WITNESS. There is $25 disbursements to go to Washington.

Mr. SCHWARTZ. You received the $25 disbursements?

The WITNESS. Yes; I received that for transportation.

Q. Has Dr. Schick been paid anything?—A. No; Dr. Schick has not been paid anything as yet.

123 The REFEREE. Dr. Schick has no claim against the Incompetent's Estate or Committee, has he?

The WITNESS. No, sir.

The REFEREE. If he has any claim it is against you?

The WITNESS. Yes, sir; against me.

Mr. SCHWARTZ. I move to strike out any claim Dr. Schick had.

The REFEREE. Denied.

Cross-examination by Mr. SCHWARTZ:

Q. Mr. Richman, when were you admitted? You are a member of the Bar, aren't you?—A. Yes.

Q. When were you admitted to practice?—A. 1927.

Q. Are you a member of any other Bar?—A. No, sir.

Q. What is the nature of your practice? What kind of matters do you take up?—A. I am more or less specializing in pension, compensation, insurance matters of this type.

Q. Against the government?—A. Yes.

Q. How many of those have you pending in your office at this time, give me an approximate idea?

Mr. RIBMAN. Objected to.

The REFEREE. Overruled.

Q. How many of these cases have you pending; cases of this kind before the government, similar to this claim?—A. I don't recall offhand but it must be at least possibly a dozen.

Q. A dozen?—A. Yes.

124 Q. How many have already been disposed of complete, where your claimants received money from the government as a result of settlement of insurance matters?—A. Possibly half a dozen.

Q. And you have still a dozen more than are now pending of the same type of claim based on lapsed war insurance policies?—A. No, I have none pending now with the possible exception of two.

Q. You only have two?—A. Yes.

Q. Yet you say that most of your practice is taken up with the prosecution of claims of this character, is that right?—A. This character is war risk insurance. I have matters which involve compensation and pension.

Q. How many of those have you, in compensation and pension, that are still pending for adjudication?—A. A few, I don't know offhand.

Q. A few?—A. Possibly two or three.

Q. How many insurance claims are now pending other than this Lowrey claim?—A. Two or three.

Q. That you appeared in Washington for before the Insurance Board Council?—A. Which I haven't appeared on as yet.

Q. They are still pending?—A. Yes.

Q. You are awaiting notice of your appearance, is that right?—A. Yes.

Q. You are duly admitted as a pension attorney, admitted by the Veterans' Administration; is that right?—A. Yes.

Q. When were you admitted to prosecute claims before Compensation Boards and War Risk Insurance Boards of the Veterans' Administration on behalf of veterans?—A. In 1934.

Q. Give me the exact date?—A. I think it was February 1934.

125 Q. Do you concede the fact that one of the requirements for admission, to be admitted as an attorney to appear before either the Compensation Board or Insurance Council Board in Washington, that you not only are a member in good standing in the State where you are admitted to practice, but also that you are fairly

familiar with the rules and regulations promulgated by the Veterans' Administration?—A. Yes. I don't see that this is relevant.

Q. You are more or less familiar?—A. Yes.

Q. I show you official printed copy issued and promulgated by the Veterans' Administration, dated December 7, 1933, and designated as Veterans' Regulation No. 10, instruction No. 3A, and ask you if this looks familiar to you. It deals with the subject of recognition of attorneys, pension claim agents——

Mr. RIBMAN. Objected to.

The REFEREE. Overruled.

A. These regulations are dated December 7, 1933. I may have seen the same regulations; I am not sure.

Q. I am referring now to that Veterans' Regulation No. 10, instruction No. 3A, issued by Frank T. Hines, Administrator of Veterans' Affairs, dated December 7, 1933, dealing with the subject of recognition of pension attorneys, pension agents, and I would like to read certain parts.

The REFEREE. Read the part that refers to him.

Mr. SCHWARTZ. I would like to put the whole thing in evidence.

126 The REFEREE. Admitted.

(Admitted in evidence and marked "Exhibit A.")

Mr. RIBMAN. Will you concede for the record that this is a true copy of the rules and regulations?

Mr. SCHWARTZ. I so concede.

(Mr. Schwartz reads portions of "Exhibit A.")

By Mr. SCHWARTZ:

Q. Have you a certificate showing that you are a duly authorized pension agent?—A. Yes.

Q. Have you that with you?—A. No, sir.

Q. Could you produce it if the Court desires it?—A. Possibly so. I have been admitted to practice before the Veterans' Administration.

Q. If I remember correctly you stated on direct examination that on October 19, 1934, when you appeared before the Insurance Claims Council of the Veterans' Administration in connection with the prosecution of this claim for insurance benefits in the Matter of William Garmes, you told your attorney, Mr. Ribman, that you spent a day or possibly two days in connection with this particular claim, is that correct?—A. That is right.

Q. Are you sure you didn't have any other matters when you were in Washington, other claims which you were interested in, other matters?—A. No; I got there earlier than the time appointed for the hearing because I wanted to go over the records in the matter in advance of the hearing.

Q. Do you mean to say it took you two days? I have be-

127 fore me a copy of transcript of the minutes of the hearing which is now part of the original records on file with the Court, which is attached to my affidavit in opposition, verified August

12, 1936, and designated as "Exhibit B," and it distinctly states that there was a hearing held in Room 115 Arlington Building, Washington, October 19, 1934, at 2 P. M., and the hearing terminated at three o'clock. Is that correct?—A. That is right. My material was very thoroughly organized and I presented it in narrative form.

Q. You read from a prepared memoranda or statement, but you claim that was the sum and substance of the entire testimony you gave?—A. It was based on doctors' reports.

Q. I didn't ask you what it was based on. Is that correct?—A. It is right.

Q. You read from all the papers?—A. Yes, sir.

Q. Was there any witness that accompanied you? Did you call any witness to testify?—A. No.

Q. Did you call this doctor that you referred to in your direct examination?—A. No, sir.

Q. When was Dr. Schick consulted? Wasn't that long after this hearing?

The REFEREE. You have an affidavit by Dr. Schick?

The WITNESS. Yes, sir; I have a statement by Dr. Schick.

Q. What is the date of that statement?—A. It is dated October 15, 1934.

Q. I believe the Court records will show that you have received the service of a copy of each of the answering affidavits in opposition of mine submitted on behalf of the Veterans' Administration, dated whatever those dates were, I think there was an original answering affidavit and two supplemental answering affidavits. They are recited in the order of Mr. Justice Kadien or in this reference?—A. Yes.

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Q. You made mention of a decision in the Supreme Court of the State of California, dated August 7, 1936, in the matter entitled—this was an appeal from the Superior Court of Mendocino County, California, to the Supreme Court of California, in the matter of an incompetent veterans' estate, entitled In Re Copsey's Guardianship, the original citation of the Superior Court, I believe, is 60 Pac. (2nd) 121. Also the printed and official copy of a decision in Re Copsey, decision of the Supreme Court of California, to which you made reference in your direct examination.

Mr. SCHWARTZ. I ask that the Court consider them in evidence in connection with this case.

A. Is that the case in which the California Court allowed $4,000 fee to an attorney? Then that is the case.

Mr. SCHWARTZ. I offer that in evidence.

Mr. RIBMAN. Objected to as immaterial. It is a legal citation.

Mr. SCHWARTZ. The witness referred to it in his direct examination.

The REFEREE. Is that the case you referred to?

The WITNESS. That is the case in which the Court allowed $4,000?

The REFEREE. Is that the case?

Mr. SCHWARTZ. Yes; that is the case.

129

The REFEREE. Put it in.

(Admitted in evidence as "Exhibit B.")

Q. I take it that you are well acquainted with the provisions of the War Risk Insurance Act and of subsequent legislation granting benefits, compensation, and war risk insurance?—A. I try to keep up with it.

Q. And you are familiar, are you not, with the provisions of Section 500 of the World War Veterans' Act of 1924, as amended, entitled: "Amount permitted to be paid agents or attorneys, solicitation, etc." This Section 500 of the World War Veterans' Act as amended is otherwise referred to as Title No. 38 of United States Code, annotated S. 551?

Mr. RIBMAN. Objected to as incompetent, immaterial, and irrelevant. By Judge Kadien's reference of this matter to your Honor to determine the reasonable value of the services rendered he has dispensed with the argument that was advanced before Mr. Justice Kadien that there was this $10 limitation, because if Judge Kadien believed and found that the $10 limit was applicable he would not have referred this matter to your Honor.

Q. I refer to the other provision that I assume you are very familiar with by this time, Sections 200 and 201 and subsequent legislation known as Public Act 844, passed by the 74th Congress, dealing with this very question?

Mr. RIBMAN. Objected to. That is a statute passed two
130 years after the rendition of the services by this attorney.

Mr. SCHWARTZ. Section 201 specifically clarifies, if there was any doubt at all on this question of fees, as to the limitation of the fees, specifically clarifies the fees that are allowed to a pension attorney. And by the way these fees are fixed by regulation, and are payable out of the moneys recovered by the government out of the award and not from the Estate. Section 500 also specifically states that the fee of $10 is payable in connection with the presentation of the claim, except where issue has been joined and suit brought after the government has refused the award of the claim.

Q. Is that right, did you institute proceedings in the Federal Court, or in any other Court, for this claim?

Mr. RIBMAN. Objected to.

The REFEREE. Objection sustained, because he has already stated that he did not; he went before the Board and got it.

Q. And they settled it without suit?

The REFEREE. Yes; that is what appears in the record.

Mr. SCHWARTZ. Section 500 of the Act, which is subsequently followed by Section 200 of Public Act 844, specifically limits the fees to $10.

Q. You are also familiar with the decision in the matter of another incompetent veteran, an appeal in a decision in the
131 Matter of Fred Shinberg, 263 N. Y. Supplement 354, Presiding Justice Martin, First Department, makes a very illuminating decision on this question of limitaton of fees, and I ask your Honor to consider that. Also the Matter of Margolin vs. the United

States, 269 U. S. 98, and the Matter of Zandurian, 142 Miscellaneous, 24.

The REFEREE. Ask questions.

Q. I show you, Mr. Richman, photostatic copy of a power of attorney that you drew up and signed to on July 7th, 1934, the original of which power of attorney is now on file with the original records of the insurance claims, Veterans' Administration, Washington, D. C., before whom you had a hearing on October 19, 1934, and I ask you whether that isn't a true photostatic copy of a power of attorney the original of which is on file in the Washington central office?—A. Yes.

Mr. SCHWARTZ. I ask that it be marked in evidence.

Mr. RIBMAN. Objected to as immaterial.

The REFEREE. Put it in.

(Admitted in evidence and marked "Exhibit C.")

The REFEREE. What is the object of this power of attorney?

The WITNESS. There was certain information contained in the records in the folder located in Washington, D. C., which I was anxious to obtain, and I didn't have any extra moneys to spend
132 in making the trip to Washington, so I asked that organization to furnish me with that information. I also asked a friend of mine who went to Washington on other matters on two different occasions to look into certain phases of this matter because the records were in Washington and I was in New York.

Q. You testified on direct examination that you received $25 for your spending a day or two in Washington, and you say now that you couldn't obtain this information that meant quite an expense, and it so happened you got it from some friend of yours that happened to be in Washington at the time. Do you deny the fact that as a duly accredited pension attorney, admitted to practice before the Veterans' Administration, if you had corresponded with the corps in Washington central office that you would not have received the information you are entitled to?—A. I needed this information in a hurry, and it has been my experience that I cannot get a reply from Washington before a month, so I resorted to this summary method of getting it. I had to prepare for the hearing and get my papers in shape, and so I handled it that way.

Q. This matter has been pending for a number of years. Could you explain what the urgency of this matter was?—A. The matter was set down for the 19th, and I had to get ready for the 19th.

Mr. SCHWARTZ. In this connection I ask your Honor to also consider the provisions of Veterans' Administration Regulation 10, Instruction No. 380, issued on December 7, 1933, by the Admin-
133 istrator of Veterans' Affairs, under Rule No. C, on page 6.

By the REFEREE:

Q. You are practically asking 30% of your recovery?—A. I am asking, as I see it—the total sum recovered, if the incompetent lives out his expectancy, will be $31,000, and I am seeking $3,000.

Q. On the amount actually recovered it is $10,000 and you are practically asking 30% or one-third?—A. Excuse me. On the fixed amount which will be paid, no matter when the incompetent dies, amounts to $15,840, so on that basis it would be 20% of the fixed amount.

Q. But you got this $10,000 without a lawsuit of any kind, and that is practically all we have to consider here.—A. If I may say so, I have prepared a little schedule of the fixed and contingent sums which will be paid. The amount that has already been paid is about $12,000, the amount which will be paid in any event, irrespective of any contingency, will be $13,800 in toto, which represents disability benefits at the rate of $57.50 per month for a period of twenty years or 240 installments, which totals $13,800. The fixed amount of savings resulting from the premium waiver over a period of twenty years amounts to $2,040, which makes a total of $15,850, representing the fixed benefit as a result of the services rendered. The contingent benefit will amount to $13,340, as far as the disability benefit is concerned, and $1,836 as far as the premium benefit saving is concerned, which makes an additional sum of $15,176, and the total, that is, both fixed and contingent benefits, will amount to
134 $31,016, and I could have rendered no more services in a suit than I did before the Insurance Claims Council.

Mr. SCHWARTZ. I also refer to transcript of the minutes of the hearing that you appeared before the Insurance Claims Council, on October 9, 1934, and I note, as part of those minutes there is a notation of a supplemental statement made by Capt. Fred Kochli, Disabled American Veterans of the World War, dated October 22, 1934, by virtue of the fact that he was unable to attend the hearing in this case on October 19, 1934; and the statement also continued, Supplementing Mr. Richman's presentation Capt. Kochli of the Disabled American Veterans of the World War states: "There is nothing material that I can add to the proof submitted by the attorney for the Claimant's Committee, Mr. Richman. I do, however, desire to concur in his contentions that the claimant has been permanently and totally disabled for insurance purposes from March 20, 1920, up to the present time. Without further argument I believe the evidence in the record is conclusive that the claimant was permanently and totally disabled before his discharge from the military service."

By Mr. SCHWARTZ:

Q. You made a similar motion for fees before Mr. Justice Brower,
135 on April 8, 1936, for similar relief, but at that time the nature of the motion was brought on, on behalf of the committee, for leave to file an intermediate accounting and in connection with the argument before Mr. Justice Brower, you did not deny the fact that one of the reasons for bringing on the application to permit the committee to file an intermediate accounting was because the committee desired compensation and commissions, and that you desired to receive a fee as a result of your prosecuting the claim for war risk insurance, and settling same. I am asking you if that did

not transpire, wasn't it a matter of record, and that thereafter you communicated with Mr. Justice Brower permitting you to withdraw the motion and subsequently you brought substantially the same application for a fee before Mr. Justice Kadien, which resulted in this hearing. Is that correct?

Mr. [illegible]. Objected to as immaterial.

The [illegible]. Have you made a prior application for this?

The Witness. No. I brought on an application on behalf of the committee for permission to file an intermediate accounting.

Q. When was that?—A. In the spring of this year. Urging, among other grounds, the insurance recovery. And Judge Brower denied that application because the intermediate accounting would have been an expense to the Estate, with the result that the application was denied.

Q. You asked for additional relief, didn't you, and that was
136 pending before Mr. Justice Brower from April until June 11, 1936, when you communicated with him asking for permission to withdraw that proceeding, and that thereafter on August 17th, Mr. Justice Brower was off the bench in Special Term, Part 6, and you brought this present motion before Mr. Justice Kadien, is that correct?—A. Just let me explain what happened. It isn't clear from what you state what the situation is.

Q. I refer to the record.—A. I brought on an application on behalf of the committee for permission to file an intermediate judicial settlement of the account on the following grounds: First to enable—One of the grounds being the situation involving the insurance. Judge Brower denied that and suggested that it wasn't necessary to have an intermediate accounting in such a matter, he would consider the phase entitling the committee to compensation separately, so I brought on an application on behalf of the committee for an allowance to him in connection with this insurance recovery, because the Administration was contending, just as they are contending now, that there is a fee limitation. While the application on behalf of the committee for an allowance to him in connection with the insurance phase of the matter was pending, the Supreme Court of the United States rendered a decision in the Stein case, so I withdrew the application pending on behalf of the committee and made this application which is now pending before the Court.

By the Referee:

Q. In this application the committee isn't asking for anything?—A. No. In the other application the committee was asking for
137 an allowance. The point wasn't raised as to my fee. It was clear from the law that the committee had a right to make an application for an allowance to him by reason of the insurance recovery.

Q. Do you mean to say you made such an application without saying whether the committee was to receive the money or whether he was to pay it to you as an attorney?—A. It was an application by

the committee for an extra allowance by reason of the insurance recovery.

Q. I will take that as true. What was the real purpose?—A. The real purpose—it wasn't clear, in view of the attitude of the Veterans' Administration, whether or not I could obtain a fee, but it was clear that the committee was entitled to it, somebody had done this work.

Q. In other words, if you weren't entitled directly to the fee the committee could make the application and get a certain allowance and pay you a fee?—A. That is right. Somebody did this work.

Mr. SCHWARTZ. In order that there may be no doubt as to what the nature of this prior application was, which attorney James Richman drew on April 8th before Mr. Justice Brower, may I offer in evidence a copy of the moving papers and ask that they be put in evidence.

The REFEREE. Yes.

(Admitted in evidence as "Exhibit E.")

By Mr. SCHWARTZ:

Q. On June 11th, 1936, you communicated with Mr. Justice Brower in reference to this original motion, and you communicated with his, as follows: Letterhead of James J. Richman, Counselor at Law, 130 Clinton Street, Brooklyn, N. Y., June 11, 1936.

The REFEREE. Put the letter in evidence.

(Admitted in evidence and marked "Exhibit F.")

By the REFEREE:

Q. Your contention is that you are entitled to a reasonable fee. Do you say it is $3,000, and that covers all your work done for the Estate, past and present, is that right?—A. That is right.

Q. Unless there is some other special contract made with you it will be in full?—A. That is correct, I am satisfied that $3,000 will cover all my services past and up to date in connection with the insurance recovery.

Q. Is there any other claim against the Estate of the Committee by you?—A. No, sir.

Q. Then it includes everything so far as this incompetent's estate is concerned?—A. Yes.

By Mr. SCHWARTZ:

Q. May I ask under what circumstances you met this committee and how you obtained this retainer?

Mr. RIBMAN. Objected to as immaterial.

The REFEREE. If you are going into the "chasing" phase of it——

By Mr. RIBMAN:

Q. There were no charges preferred against you by the Veterans' Bureau or Pension, or any other party?—A. None whatsoever.

139 *Report of referee*

By the Referee:

James J. Lowrey, the Committee of the person and property of William Garmes, incompetent, having petitioned the Court for an order authorizing him to pay a reasonable fee to James J. Richman, Attorney, for legal services rendered to the Estate, and said matter having been referred by the Court to an Official Referee to take testimony and report with his opinion as to the services rendered herein by James J. Richman, and the value of such services, I respectfully report that I have heard the testimony offered from which it appears that the said attorney discovered or revived the recovery of war insurance by the incompetent of some $10,000, together with accumulated installments, which recovery has a future or increased value and that the services rendered by said attorney consisted of searching papers and presentation before the Pension Board, or whatever Board he applied to, of the War Veterans, or otherwise, but that no action was brought, and that such services have a certain special value which the attorney claims to be of the sum of $3,000, and which I find to be of the value of $1,500.

I therefore report the services rendered to be of the value as above stated.

Exhibit I

James J. Richman, Esq., April 21, 1934.
1482 Broadway, New York City.

140 Re: Garmes, William (Incompetent)

Dear Mr. Richman: I hereby retain you to prosecute whatever claim my above named brother and ward may have under the war risk insurance contract in the sum of $10,000.00 issued to him by the United States Government.

In the event that you are successful, the Court will fix your fee.

In the event you are unsuccessful, you are to receive no fee.

Yours truly,

(S) James J. Lowrey,
Brother and Committee.

In Supreme Court of New York, County of Kings

Report of official referee, in support of motion

An order dated December 18th, 1936, signed by Mr. Justice Kadien having been made referring this matter to an Official Referee to take testimony and report with his opinion as to the services rendered herein by James J. Richman, Esq., and the value of such services, and the matter having duly come on to be heard before me on the 4th day

of January 1937, and James J. Lowrey, petitioner committee,
141 and James J. Richman, attorney for petitioner committee, having testified in support of the petition of James J. Lowrey, verified July 3rd, 1936, and James A. Clark, by Abraham Schwartz, of counsel, attorney for the Veterans' Administration, having appeared on the hearing, and due deliberation having been had,

I do hereby report that the services rendered by James J. Richman, Esq., to the Estate of William Garmes, Incompetent, in connection with the War Risk Insurance Contract in the sum of Ten Thousand ($10,000) Dollars, issued by the United States Government to William Garmes, Incompetent, is of the reasonable value of Fifteen Hundred ($1,500.00) Dollars.

Dated the 6th of January 1937.

JAMES C. VAN SICLEN,
Official Referee,
Second Judicial Department.

In Supreme Court of New York, Kings County

Affidavit of Abraham Schwartz, in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Abraham Schwartz, attorney for the Veterans' Administration, being duly sworn, deposes and says:

142 Your deponent respectfully submits this affidavit in opposition to the granting of the relief prayed for by attorney James J. Richman in the Notice of Motion returnable before this Court on January 12, 1937, and reiterates his request that this Court disregard in its entirety any claim on the part of the committee and his attorney for the payment of any funds out of the estate of William Garmes, the incompetent veteran herein, in excess of ten dollars on the ground that this application is simply a subterfuge to obtain by indirect methods monies out of the estate of an incompetent which could not be obtained directly. This contention is made more so especially in view of the sworn testimony of the committee as well as of his attorney, James J. Richman, adduced at the hearing before Official Referee James C. Van Siclen on January 4, 1937, pursuant to an order of this Court dated December 18, 1936, and to a transcript of the minutes of the hearing to which your deponent respectfully refers.

In addition to your deponent's answering affidavit sworn to August 12, 1936, and Exhibits A, B, and C, annexed thereto, the second answering affidavit sworn to August 18, 1936, and the third answering affidavit sworn to August 20, 1936, now on file and a part of the record of this Court in this proceeding, your deponent also respectfully invites the Court's attention to attached photostat copies of Exhibit A designated "Veterans Regulation No. 10, Instructions No. 3–A," as promulgated by Frank T. Hines, Administrator of

Veterans' Affairs, and dated December 7, 1933, and of Exhibit B, being a copy of a decision by the Supreme Court of California,
143 dated August 7, 1936, and concerning the denial of a motion to dismiss an appeal taken by the Veterans' Administration in an incompetent veteran account proceeding entitled "In Re Copsey's Guardianship," which latter decision in its concluding paragraph clearly distinguishes the facts in that case with those of the proceeding decided by the United States Supreme Court in the case of Frank T. Hines vs. Minnie Stein, as guardian, etc., 56 S. Ct. 699, 701, 80 L. Ed.—decided April 27, 1936. (Both of the foregoing Exhibits [A and B] were at length discussed and marked in evidence in the January 5, 1937, hearing before Official Referee Van Siclen as hereinabove mentioned.) Parenthetically, your deponent desires to point out that in the Stein case the Veterans' Administration for one did not dispute the reasonableness of attorney's fee allowed by the Pennsylvania Court of Common Pleas; but in the Copsey case, supra, as well as in the instant proceeding, the Veterans' Administration does insist that not only should the fees of the attorney for services be restricted to $10.00 as fixed by the federal statutes (and Veterans' Administration regulations in effect) but that the fees as claimed for by the attorneys are unreasonable, excessive, and unconscionable.

Your deponent further respectfully urges that the situation in this case does not justify an award in excess of $10.00 to attorney Richman if we believe his own sworn testimony before the Official Referee, as aforementioned, which on cross-examination established the following facts:

1. That James J. Richman prior to the bringing on of the instant proceedings was duly admitted by the Administrator of
144 Veterans' Affairs as a Pension Attorney, in the presentation of claims, including disability compensation, pension, and government insurance benefits before its constituted rating boards and councils; that as such Pension Attorney the major portion of his law office practice consisted of prosecuting such claims before the Veterans' Administration; that he was at all times familiar with and had a thorough knowledge of all of the federal statutes, Presidential Executive Orders, and rules and regulations of the Veterans' Administration governing the granting of benefits as aforementioned, and especially of Veterans' Regulation No. 10 restricting his attorney fees to ten dollars (see Exhibit A hereto attached).

2. That he, James J. Richman, duly admitted Pension Attorney as such, was at all times amenable to all the laws and Veterans' Administration regulations pursuant thereto governing the procedure of handling claims filed with the Administration.

3. That he, James J. Richman, was well acquainted with Section 500 of the World War Veterans' Act of 1924, as amended, which restricts the collection of an attorney fee to an amount not in excess of ten dollars, unless suit be instituted against the government and issue thereafter joined, in which event the Court fixes the amount

not to exceed 10% from the amount of recovery or judgment entered thereon; and that he was also acquainted with Sections 200 and 201 of Public Act No. 844 of the 74th Congress (enacted June 29, 1936, and before the bringing on the present application dated August 1, 1936) restricting the amount of attorney fees to $10.00.

145 Your deponent at this point also desires to call this Court's attention to the fact that irrespective of the restrictive "attorney fee" statutes just mentioned, that at no time has Attorney Richman conclusively established his consuming of "200 hours" of his time which he alleged resulted in the settlement of the insurance claims award by the government (see Exhibit J attached to the moving papers).

Deponent further states that the records on file of the Veterans' Administration, Insurance Claims Council, clearly show, and Pension Attorney Richman has admitted, that neither he nor the committee herein was ever compelled, or actually did, bring suit against the United States Government to recover the insurance award payments, which were granted as a result of a fifteen-minute hearing before the board of government insurance adjudicators; that attorney Richman's appearance before the Veterans' Administration Insurance Claims Council was accomplished in ordinary routine fashion, as are thousands of similar non-contested claims for similar benefits now pending before that adjudicating body. In fact, other than attorney Richman on October 19, 1934, and a Captain Fred Kochli, representative of the Disabled American Veterans of the World War, to whom attorney Richman gave a Power of Attorney, there were no witnesses that were produced at the insurance board for questioning. However, deponent in this connection desires to call the Court's attention to the photostat copy of Power of Attorney furnished by Pension Attorney James J. Richman, dated July 7, 1934, appointing the Disabled American Veterans of the World War, a recognized ex-servicemen's organization, "to prosecute claim for disability

146 benefits before the Insurance Claim Council under the terms of a War Risk Insurance policy in the sum of Ten Thousand ($10,000) Dollars issued to the said William Garmes, incompetent, by the United States Government. It is understood that no fee or compensation of whatsoever nature will be charged for the service rendered pursuant to this Power of Attorney and that this Power of Attorney may be cancelled by me on written notice to the Veterans' Administration." (See Exhibit C attached to your deponent's answering affidavit of August 12, 1934.)

In view of the foregoing, your deponent prays that the compensation to be allowed the Pension Attorney for the committee herein as and for his services in connection with the settlement of claim filed with the Veterans' Administration without the necessity of instituting a suit against the United States Government, be restricted to a sum not in excess of ten dollars, thus modifying the report of Official Referee James C. Van Siclen to the extent herein recommended, and rightfully discouraging the machinations of members

of the Bar permitted to practice before the rating agencies of the Veterans' Administration, to apply their legal acumen and knowledge of government regulations for their own benefit and at the expense of the incompetent veteran disabled by war service.

ABRAHAM SCHWARTZ.

Sworn to before me this 11th day of January 1937.

JAMES A. HEVERIN,
Notary Public.

Bronx Co. No. 51, Reg. No. 51H38. Cert. filed in N. Y. Co. No. 372, Reg. No. 8H195. Commission expires March 30, 1938.

147 *Exhibit A, annexed to affidavit of Abraham Schwartz*

5. A fee not to exceed $10.00 may be allowed for the successful prosecution of an application for excess pension or apportionment and a similar fee may be allowed for the successful defense of an application for apportionment. No fee will be allowed under this provision unless material assistance has been rendered.

E. Requirements apply to practice in the prosecution of other than pension claims:

1. The requirements relating to recognition of Pension Attorneys and Pension Agents to practice before the Administration as contained in these instructions shall apply in equal force to any attorney or agent seeking to represent a claimant in a claim for benefits of Emergency Officers' Retirement pay or Civil Service Retirement pay except that the schedule of fees as provided for in Paragraph D (1) pursuant to Veterans Regulation No. 10 applies only in pension claims. Care will be exercised in all matters respecting any fee or any effort to obtain or the acceptance of any exorbitant or inequitable fee will subject an attorney or agent to suspension or disbarment and any penalty otherwise imposed by law.

F. Recognition of gratuitous services of a relative or friend of claimant:

1. Nothing contained in these instructions shall be construed as prohibiting recognition of a relative or friend of the claimant
148 who gratuitously and at the written request of the claimant represents the latter in any case wherein the official of the Administration handling the claim is satisfied as to the bona fide status of the relative or friend as such.

G. Banks or trust companies acting as guardians for veterans may be represented before special review boards:

1. Banks or trust companies, corporate entities, acting as guardians for veterans may be represented before special review boards as authorized representatives of veterans by any officer or employee thereof including a regularly employed attorney if such employee or attorney represents the corporation in its fiduciary capacity but no fee may be allowed for such services under Rule 8 hereof.

H. Veterans Regulation No. 10, Instruction No. 3, and paragraphs 1, 2, and 4 of Veterans Regulation No. 10, Instruction No. 5, are hereby canceled.

Frank T. Hines,
FRANK T. HINES,
Administrator of Veterans' Affairs.

DECEMBER 7, 1933.

Exhibit B, annexed to affidavit of Abraham Schwartz

In Re Copsey's Guardianship

Sac. 5051

Supreme Court of California

Aug. 7, 1936

In Bank.

Appeal from Superior Court, Mendocino County, Benjamin C. Jones, Judge.

149 Proceeding in the matter of the guardianship of the estate of Raymond Copsey, incompetent. From a judgment of the probate court allowing and approving the account of Lena Copsey, guardian, which allowed fees to the attorney of the guardian, Frank T. Hines, administrator of veterans' affairs, appealed, and the guardian moves to dismiss.

Motion denied.

James B. Burns, Chief Atty., Veterans' Administration, and A. J. Whalen, Asst. Chief Atty., Veterans' Administration, both of San Francisco, for Frank T. Hines, Adm'r., Veterans' Affairs.

Arthur L. Wessels, Frank W. Taft, and Mannon & Brazier, all of Ukiah, for Lena Copsey.

H. L. Preston, of Ukiah, amicus curiae, for Bank of America.

CURTIS, Justice.

Motion to dismiss an appeal from that portion of an order of court allowing and approving the thirteenth annual account of the guardian of the estate of Raymond Copsey, an incompetent person, which allows fees to the attorney for said guardian "for services alleged to have been rendered in said matter in the amount of $649.49 for his ordinary services and in the amount of $4,000 for his extraordinary services rendered."

Raymond Copsey, the incompetent, was a veteran of the World War, and his entire estate, which was administered by his guardian in this matter, was derived from the government of the United States, and consisted of the various sums of money paid by the government of the United States in pursuance of the World War Insurance Act, and other federal statutes, providing aid to soldiers

150 who served their government in said war. The appeal was taken by Frank T. Hines, administrator of veterans' affairs.

The motion to dismiss the appeal was based upon eight grounds, only two of which merit any extended discussion, and these two in reality involved only one question, and that is the right of the administrator of veterans' affairs to appear in said guardianship matter and take an appeal from the court's order allowing that portion of the guardian's account appealed from. Before discussing this question, we might say regarding the other six grounds which are made the basis of this motion, that the notice of appeal was filed in time, having been filed within less than 60 days from the date of the order appealed from; the same may be said regarding the time and filing notice to prepare transcript; there is no provision of law requiring the notice of appeal to be addressed to the opposite party; the record fails to show that the appellant acquiesced in the order appealed from; the failure to file an undertaking to secure the cost of the preparation of the record on appeal is no ground for the dismissal of the appeal; and the general statement that the appellant by his conduct waived his right to take said appeal is not supported by the record before us.

Addressing ourselves to the two other grounds upon which the motion is based, and which in our opinion require a more detailed discussion, they are set forth in the respondent's moving papers substantially as follows: That the nominal appellant is not aggrieved, and that the appellant is not a party to the proceedings in the
151 trial court, and is, therefore, without any right to appeal from the order of said court.

By an act of Congress, the United States Veterans' Bureau was created (World War Veterans' Act 1924, Sec. 4, 38 U. S. C. A. Sec. 425), the executive officer of which is the administrator of veterans' affairs (38 U. S. C. A. Sec. 11a). Among other requirements, the act provides that: "Whenever it appears that any guardian, curator, conservator, or other person, in the opinion of the Administrator, is not properly executing or has not properly executed the duties of his trust or has collected or paid, or is attempting to collect or pay, fees, commissions, or allowances that are inequitable or in excess of those allowed by law for the duties performed or expenses incurred, or has failed to make such payments as may be necessary for the benefit of the ward or the dependents of the ward, then and in that event, the Administrator is empowered by his duly authorized attorney to appear in the court which has appointed such fiduciary, or in any court having original concurrent, or appellate jurisdiction over said cause, and make proper presentation of such matters: Provided, That the Administrator, in his discretion, may suspend payments to any such guardian, curator, conservator, or other person who shall neglect or refuse, after reasonable notice, to render an account to the Administrator from time to time showing the application of such payments for the benefit of such incompetent or minor beneficiary; * * * Provided further, That the Administrator is authorized and empowered to appear or intervene by his duly authorized attorney in any court as an interested party in any litiga-

tion instituted by himself or otherwise, directly affecting
152 money paid to such fiduciary under this section." World War Veterans' Act 1924, Sec. 21, as amended, 38 U. S. C. A. Section 450. By Section 1657 of the Probate Code of this state, it is made the duty of every guardian of an estate who has received on account of his ward any moneys from the United States Veterans' Bureau to annually file a verified account of all moneys received and disbursed, and to send a certified copy of said account to said bureau, together with notice of the time and place of hearing of said account, not less than 15 days prior to the date fixed for the hearing of said account. It will thus be seen that the federal statute has given to the administrator of veterans' affairs the right to appear in any proceeding in court where, in the opinion of the administrator, the guardian is not properly executing his duties or is attempting to pay fee, commissions, or allowances in excess of those allowed by law. This right has been at least impliedly approved by this state by the enactment of the Uniform Veterans' Guardianship Act (Probate Code Sec. 1650 to 1669, both inclusive), of which section 1657 above cited is a part.

(5) We will now return to the consideration of the two grounds of dismissal last mentioned, the first of which is that the nominal appellant, Frank T. Hines, as administrator of veterans' affairs, is not an aggrieved party within the meaning of section 938 of the Code of Civil Procedure, which provides that, "Any party aggrieved may appeal." The administrator acts only in a representative capacity in which he represents only the interest of the ward. This duty, as we have seen, has been placed upon him by the federal statutes with the approval of our own state. The ward, whose estate is
153 made liable for the fee allowed the attorney for the estate, is in every sense of the words an aggrieved party. A goodly portion of his estate has by the decree appealed from been ordered by the court to be paid to his attorney. The order is in the nature of a judgment against the ward from which the law allows an appeal by the representative of the ward. It is true that the new guardian might have, in our opinion, appealed from said order, but the fact that it has not done so does not bind the ward, nor relieve the administrator from his duty in the premises. This same question has been before the courts of other states, and in every instance to which our attention has been called, it has been held that the administrator or the bureau which he represents has such an interest in the subject matter of the appeal as would entitle him, or the bureau, to appeal from an order like that involved in this proceeding. United States Veterans' Bureau v. Thomas, 156 Va. 902, 159 S. E. 159; Hines v. Hook (Mo. Sup.) 89 S. W. (2d) 52; Hines v. McCoy, 172 Miss. 153, 159 So. 306; In re Shinburg's Estate, 238 App. Div. 74, 263 N. Y. S. 354. See also In re Minor's Guardianship, 164 Miss. 329, 145 So. 507; Hines v. Paregol, 64 App. D. C. 306, 77 F. (2d) 953.

(6) The other of the two grounds upon which the motion to dismiss is based is equally untenable. This ground, as we have seen, is that the appellant, the administrator of veterans' affairs, was not a party

to the proceeding in the probate court, and, therefore, has no standing as an appellant in this court. As we have already shown, the administrator simply represents the interest of the ward. He is expressly authorized and directed by the federal statute, for the
154 protection of the ward's interest, to appear in any court having original or appellate jurisdiction over any cause where it appears that the guardian is attempting to pay fees or allowances which are inequitable or in excess of those allowed by law. Therefore, when his attention was called to the order approving the guardian's account and allowing the attorney for the ward the fees set forth above, it was his duty to protect the interest of the ward, if in his judgment the fees were illegal or exhorbitant. To this end he was authorized to appear in the probate court and file the required notices in order to effect an appeal from the order, and also to appear in this court to prosecute said appeal. But aside from the above considerations, the fact that he had not appeared at the hearing of the guardian's account and objected to the same did not deprive him of the right to appeal therefrom. 11 Cal. Jur. 199; In re Estate of Benner, 155 Cal. 153, 99 P. 715; In re Estate of Levy (Cal. Sup.), 48 P. (2d) 675.

Respondent has directed our attention to a recent case decided by the United States Supreme Court, Frank T. Hines v. Minnie Stein, as guardian, etc., 56 S. Ct. 699, 701, 80 L. Ed. —, decided April 27, 1936, which he claims is conclusive of the present appeal. In that case the administrator of veterans' affairs objected to an attorney's fee, which was allowed by the local court to an attorney for special services rendered by him in the guardianship matter, on the ground that the same was in excess of the amount fixed by the federal statutes and in the president's order promulgated thereunder. Practically the same contentions made by the appellant in the present
155 guardianship matters were made there. The Supreme Court of the United States held in that case that, "We find nothing in any of these acts of congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officers, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them." It accordingly affirmed the order of the court of common pleas fixing and allowing said attorney's fees. But in that case the appellant admitted that the services were rendered by the attorney and that the charge was reasonable. While the appellant in his brief does not stress the point that the charge of $4,000 for extraordinary services rendered by the attorney in the Copsey guardianship matter was unreasonable, he does not expressly or by implication in any stage of these proceedings admit its reasonableness. This distinction between the two cases deprives the cited case of any authoritative force upon the hearing of respondent's present motion to dismiss. Incompetent persons are made the special wards of the court, and it is the duty of the court to protect them and their property whenever

it appears from the records in any proceeding before the court that such protection is necessary or advisable.

The motion is denied.

We concur:

WASTE, *C. J.*
SHENK, *J.*
SEAWELL, *J.*

156 In Supreme Court of New York

Affidavit of no opinion

STATE OF NEW YORK,
County of New York, ss:

William A. Gillcrist, being duly sworn, deposes and says that he is an Attorney-at-Law associated with James A. Clark, counsel for the appellant herein; that no opinion in writing was handed down by the Court below other than that which is included in the record herein.

WILLIAM A. GILLCRIST.

Sworn to before me this 25th day of March 1937.

ELIZABETH FELSTEIN,
Notary Public.

N. Y. Co. Clk's No. 276. Commission Expires March 30, 1938.

In Supreme Court of New York

Stipulation waiving certification

It is hereby stipulated, that pursuant to Section 170 of the Civil Practice Act, the foregoing is a true copy of the Notice of Appeal, the Order Appealed From, and all the papers upon which the Court below acted in making said order, now on file in the office of the Clerk of the County of Kings.

Certification thereof in pursuance of Section 616 of the Civil Practice Act is hereby waived.

Dated New York, N. Y., March 26th, 1937.

JAMES A. CLARK,
Attorney for Appellant.
JAMES J. RICHMAN,
Attorney for Respondent.

157 In Court of Appeals of New York

[Title omitted.]

Order denying leave to appeal

Jan. 11, 1938

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion me, and the same hereby, is denied without costs.

A Copy.
[SEAL]

RUFUS KIMBALL,
Deputy Clerk.

158 In Supreme Court of New York, Appellate Division

[Title omitted.]

Order denying motion for leave to appeal to the Court of Appeals

Nov. 19, 1937

The above named Veterans' Administration, the appellant in this proceeding, having made a motion for leave to appeal to the Court of Appeals; and the motion having been duly submitted:

Now on reading and filing the papers in support of and in opposition to said motion, and all the papers upon which the appeal was heard; and due deliberation having been had thereon:

It is ordered that the said motion be, and the same hereby, is denied.

Enter:

W. F. H.,
Acting Presiding Justice.

Entered 11/19/1937.

[Clerk's certificate to foregoing paper omitted in printing.]

159 In Supreme Court of New York, Appellate Division

Present: Hon. WILLIAM F. HAGGERTY, Acting Presiding Justice; Hon. WILLIAM B. CASWELL, Hon. JOHN B. JOHNSTON, Hon. FRANK F. ADEL, Hon. FREDERICK P. CLOSE, Justices.

In the Matter of the Application of James J. Lowrey, Committee of the person and property of William Garmes, Incompetent, for an order authorizing him to pay a Fee to Counsel for legal services rendered the Estate.

VETERANS' ADMINISTRATION, APPELLANT

v.

JAMES J. LOWREY, AS COMMITTEE, ETC., OF WILLIAM GARMES, AN INCOMPETENT PERSON, RESPONDENT

Order of affirmance

Oct. 22, 1937

The above named Veterans' Administration, Appellant in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 9th day of February 1937, granting Petitioner's motion to confirm Report of Official Referee, awarding to James J. Richman, an attorney, the sum of $1,500.00 for legal services rendered the Estate of the Incompetent herein, and the said appeal having been argued by Mr. William A. Gillcrist, of Counsel for the appellant, and argued by Mr. Benjamin C. Ribman, of Counsel for the respondent, and due deliberation having been had thereon:

It is ordered that the order so appealed from be and the same hereby is unanimously affirmed with costs.

Enter:

W. F. H.,
Acting Presiding Justice.

[Clerk's certificate to foregoing paper omitted in printing.]

160 In Supreme Court of New York, Appellate Division

[Title omitted.]

Order of affirmance

Oct. 22, 1937

The above named Veterans' Administration, respondent in this proceeding having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 9th day of February 1937, granting petitioner's motion to confirm report of official referee, awarding to James J. Richman, an attorney, the sum of $1,500 for legal services rendered the estate of the incompetent herein, and the said appeal having been argued by Mr. William A. Gillcrest of Counsel for the appellant and argued by Mr. Benjamin C. Ribman

of Counsel for the respondent, and due deliberation having been had thereon:

It is ordered that the order so appealed from be and the same hereby is unanimously affirmed, with costs.

Enter:

W. F. H.,
Acting Presiding Justice.

161 [Clerks' certificates to foregoing transcript omitted in printing.]

Sir: Please take notice that the within is a true copy of an order this day entered herein in the office of the Clerk of County of Kings.

Dated, N. Y., November 4, 1937.

Yours, etc.

JAMES J. RICHMAN.
Attorney for Respondent, Office and Post Office Address, 190 Clinton St., Borough of Brooklyn, New York City.

To JAMES A. CLARK, Esq.,
Attorney for Appellant, 341 Ninth Ave., N. Y. C.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

Filed May 23, 1938

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 193

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TABLE OF CASES CITED

STATUTES AND RECORDS CITED

STATUTE RELIED ON

In the Supreme Court of the United States

OCTOBER TERM, 1937

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, Incompetent, for an order authorizing him to pay a fee to counsel for legal services rendered the estate

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No. 945

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, UNITED STATES VETERANS' ADMINISTRATION, PETITIONER

v.

JAMES J. LOWREY, COMMITTEE OF THE PERSON AND ESTATE OF WILLIAM GARMES, AN INCOMPETENT PERSON, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

To the Honorable the CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, Frank T. Hines, Administrator of Veterans' Affairs, prays that a Writ of Certio-

rari issued to review the judgment of the Supreme Court of New York, Appellate Division, Second Department, in the above entitled cause, which judgment became final January 11, 1938, upon denial of a motion for leave to appeal by the Court of Appeals of New York, on the specific question whether the applicable Federal Statute (Section 500, World War Veterans' Act, Section 551, Title 38, U. S. C.) was construed by this Honorable Court in the case of *Hines* v. *Stein*, 298 U. S. 94, 80 L. E. 1063, or is controlled thereby, and if not, whether the said judgment be not in contravention of said Federal Statute.

In support whereof Petitioner respectfully represents to this Honorable Court that he is, and at all times pertinent to this action has been, Administrator of Veterans' Affairs; and that pursuant to the responsibility reposed in him by Section 450, Title 38, U. S. C., and as a party in interest under Section 1384-t of the Civil Practice Act of the State of New York, he appeared in the State Courts by his duly authorized attorney, and now files this petition, on behalf of the said William Garmes, an insane veteran of the World War, and for the purpose of securing for said veteran a right granted, it is believed, by the said Federal Statute; viz., the right not to have his estate charged with a fee made illegal by said Statute.

ACTION IN THE STATE COURTS

This proceeding was commenced by the filing in the Supreme Court of New York held in and for Kings County of an application for an order authorizing James J. Lowrey, as committee of William Garmes, an incompetent person, to pay to James J. Richman, Esq., a fee for legal services rendered to the estate in the matter of the collection of war-risk insurance (6–8 R.).

Affidavits in opposition thereto were submitted by Abraham Schwartz, attorney for the Administrator, and the matter was referred, by an order of Mr. Justice Kadien, dated December 18, 1936, to an Official Referee to take testimony and report with his opinion as to the services rendered by James J. Richman, Esq., and the value of such services (4–5 R.).

A hearing before the Honorable James C. Van Siclen, Official Referee, was held on January 4, 1937, and on January 6, 1937, said Official Referee reported that the services rendered by James J. Richman, Esq., in connection with the war risk insurance contract in the sum of $10,000 issued by the U. S. Government to William Garmes, incompetent, are of the reasonable value of $1,500 (70–71 R.).

On January 12, 1937, James J. Lowrey, Esq., moved the court for an order modifying the report of the Official Referee dated January 6, 1937, so as to increase the fee allowed from $1,500 to $3,000.

An affidavit in opposition to said motion was submitted by Abraham Schwartz for the Veterans' Administration (71 R.).

On February 8, 1937, an order was granted by the Honorable Mr. Justice Thomas C. Kadien and entered in the office of the Clerk of the County of Kings on February 9, 1937, confirming the report of the Official Referee dated January 6, 1937, and directing James J. Lowrey, Committee of William Garmes, incompetent, to pay to James J. Richman, Esq., out of the estate of the incompetent, the sum of $1,500 as and for his legal services (2-4 R.).

An appeal from said order was duly taken by Petitioner herein to the Appellate Division, Second Department, which court on October 23, 1937, affirmed the order of the lower court by entry as follows:

> The above-named Veterans' Administration, Appellant in this proceeding, having appealed to the Appellate Division of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings, on the 9th day of February 1937, granting Petitioner's motion to confirm report of Official Referee, awarding to James J. Richman, an attorney, the sum of $1,500 for legal services rendered the estate of the incompetent herein, and the said appeal having been argued by Mr. William A. Gillcrist of counsel for the appellant and argued by Mr. Benjamin C. Ribman of

counsel for the respondent, and due deliberation having been had thereon:

It is ordered that the order so appealed from be and the same hereby is unanimously affirmed with costs (R. 81).

Motion for leave to appeal to the Court of Appeals was duly filed, and was denied by said Appellate Division on November 19, 1937. (R. 80.)

Application to appeal, duly filed with the Court of Appeals, State of New York, was by that court denied January 11, 1938 (R. 80). The effect of said denial is that the order of the Supreme Court, Appellate Division, the highest court in said State having jurisdiction of said cause, became final on January 11, 1938.

This petition for Writ of Certiorari is filed within three months of the time when said judgment became final and there is presented herewith a certified copy of the entire record and proceedings in the State Courts.

This petition for Writ of Certiorari is filed under the provisions of Title 38, U. S. C., Section 344, paragraph (b) (Section 237 Judicial Code as amended), on the ground that the judgment of the State Court deprives the insane veteran, represented by Petitioner, of a right granted by a Federal Statute under a construction of said statute by the said State Courts not heretofore examined by this Honorable Court, and contrary to that formerly reached by the courts of last resort of several States, including that of the State of New

York (In re Shinberg, 263 N. Y. S. 354) and recently by the Supreme Court of the State of California (In re Copsey, 60 Pac. (2d) 121). This latter decision has been modified by decision of the Supreme Court of California in the same case February 24, 1938 (76 Pac. (2d) 691. See petition for Writ of Certiorari in No. 946 filed herewith).

SUMMARY AND BRIEF STATEMENT OF MATTERS INVOLVED—QUESTION PRESENTED

The question presented herein is whether the applicable statute, Section 500, World War Veterans' Act, supra, was construed by this Honorable Court in the case of *Hines* v. *Stein*, 298 U. S. 94, 80 L. E. 1063, or is controlled thereby; and if not, whether the judgment of the New York Court be not in contravention of the terms of said statute.

In this case, wherein no suit was ever filed in a Federal Court under Section 19, World War Veterans' Act, Section 445, Title 38, U. S. C., or otherwise (R. 65), the committee Lowrey purportedly contracted with the attorney, James J. Richman, to represent the insane veteran, William Garmes, in securing payment of war risk insurance; and in the event of success—"the court will fix your fee" (R. 70.) The attorney, through petition filed by the committee, claimed a fee of $3,000 (R. 69) and the court allowed a fee of $1,500 (R. 71). Your Petitioner objected on the ground, among others, that any fee in excess of $10.00 is prohibited by Section 500, supra (31–32 R.); and counsel for

committee contended that the decision of this Honorable Court in the Stein case, supra, was that the Congress cannot limit the discretion of a State Court to allow an attorney fee in the case of an insane veteran under guardianship (R. 43). The decision of the court—no opinion rendered (R. 81)—therefore no citation available—overruling your Petitioner's exceptions and allowing the fee must have been based upon said theory as the New York courts had theretofore held that the statute is controlling as to the State Court (*In re Shinberg*, supra).

FACTS FROM WHICH CONTROVERSY ARISES

About April 1934, James J. Lowrey, committee of the person and property of William Garmes, an incompetent person, under an appointment made on or about March 23, 1921, retained James J. Richman, an attorney, to file a claim of the said William Garmes against the Veterans' Administration upon a policy of war risk insurance (R. 6); and an agreement, undated, was entered into by the committee and the same James J. Richman providing that in the event that the proceeding for the payment of the war-risk insurance was successful, a fee to Mr. Richman would be fixed by the court; and in the event that the proceeding was unsuccessful, there would be no charge (R. 70).

Thereafter, James J. Richman assisted the said committee in preparing necessary papers, affidavits, and other data for submission to the Insur-

ance Claims Council of the Veterans' Administration (Exhibits A to I incl. 12–27 R.) claiming permanent and total disability from 1920.

This claim was denied by the Veterans' Administration, April 19, 1934, on the sole ground that Public, No. 2, 73d Congress, the so-called "Economy Act," had repealed all laws pertaining to War Risk Insurance (R–12). A few days later, June 4, 1934, this Honorable Court, in the Lynch and Wilner cases, 292 U. S. 571, 78 L. E. 1434, held that so much of said act as purported to repeal said laws was void. Thereafter, said claim was considered and allowed by the Veterans' Administration.

James J. Richman on or about July 7, 1934, executed a power of attorney to the Disabled American Veterans of the World War to prosecute a claim for disability insurance benefits before the Insurance Claims Council on behalf of William Garmes, the incompetent person (41–42–66 R).

James J. Richman appeared personally before the Insurance Claims Council upon the hearing before that body on October 19, 1934, in Washington, D. C. (R. 28), and on October 31, 1934, the Insurance Claims Council of the Veterans' Administration approved the claim for insurance (R. 21–23).

On or about February 25, 1936, the committee, through his attorney, James J. Richman, brought an application at Special Term, Part VI (Supreme Court, Kings County) for permission to file an intermediate accounting which was denied (R. 67–68). Thereupon an application was made in Spe-

cial Term, Part VI for an order fixing an allowance *to the committee* for extraordinary services by the said committee on account of the insurance recovery (R. 38, 68). The purpose of this application was in order that the committee might obtain an allowance from which he could pay an attorney's fee to James J. Richman for his services in the war-risk-insurance proceeding (R. 69). This application was withdrawn by a letter from James J. Richman to the Honorable George E. Brower, Presiding Justice, said court, which letter is dated June 11, 1936, because the attorney believed that in view of the decision of this court in *Hines* v. *Stein, supra,* he could claim a fee in his own right (R. 38, 69).

Thereafter, and on August 17, 1936, the committee petitioned the Court at Special Term, Part VI, for permission to pay James J. Richman, his attorney, a reasonable fee for his services in obtaining the war-risk insurance from the Veterans' Administration (R. 5-8). James J. Richman joined in the petition of the committee and asked for a fee of $3,000 (R. 8-11).

Thereafter, on an order made and entered on December 18, 1936 (R. 4-5) a hearing was had before the Official Referee (R. 54-69) who reported that the services performed were of the reasonable value of $1,500 (R. 70). The Administrator of Veterans' Affairs as required by Federal Statute, Section 21, World War Veterans' Act (Sec. 450, Title 38, U. S. C.) as amended by Public, No. 262, 74th Congress, and as authorized by Section 1384-t

of the Civil Practice Act, New York, duly objected to the report and the fee as contrary to the applicable Federal Law. The report was, nevertheless, confirmed by an order made and entered on February 8, 1937 (R. 47). Appeal was taken with results as stated supra under heading, "action in State Courts." (Pp. 3–6 herein.)

The sole question involved is the legality of the fee, the attorney having previously been paid his expenses (R. 29), although the reasonableness of the fee dehors the statute was not conceded. The insurance in question was paid pursuant to, and by virtue of, the provisions of Section 300 Title III of the War Risk Insurance Act, October 5, 1917, as amended by the World War Veterans' Act, 1924 (Sec. 511, Title 38, U. S. C.) as amended.

Section 500, Title V of said Act (Sec. 551 Title 38, U. S. C.) is as follows:

> Except in the event of legal proceedings under section 19 of Title I of this Act, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Titles II, III, and IV of this Act, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application

to the bureau shall not exceed $10 in any one case: *Provided, however,* That wherever a judgment or decree shall be rendered in an action brought pursuant to section 19 of Title I of this Act the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered, and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid. Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

STATUTES AND AUTHORITIES RELIED UPON BY PETITIONER

The statute quoted, supra (Section 500, World War Veterans'-Act) is controlling upon attorneys and guardians of insane veterans; and therefore upon State Courts having jurisdiction of such guardianships. *In re Shinberg,* 263 N. Y. S. 304. *In re Minor,* 145 So. 507. *Hines* v. *McCoy,* 159 So. 306.

The *Stein* case, supra, is not controlling. *In re Copsey*, 60 Pac. (2d) 121. (But see later decision in same case, 76 Pac. (2d) 691, indicating judicial uncertainty on the question.

Any contract contrary to the provisions of said Section 500 is illegal, and hence void. *Conlon* v. *Adamski*, 77 Fed. (2d) 397. The contention of respondent that the Congress may not limit an attorney fee in a matter pending in a State Court is contrary to the decision of this Honorable Court in *Capital Trust Co.* v. *Calhoun*, 250 U. S. 208.

The Congress may, indirectly, restrict effective action by State Courts through legislation on a *subject* within its constitutional power; and may prohibit, or render unenforceable, contracts contrary to legislation within such constitutional power. *Gold Clause cases*, 294 U. S. 239; *Gibbons* v. *Ogden*, 9 Wheat. 1, 22 Law Ed. 207. In enacting said statute (Section 500, World War Veterans' Act) the Congress acted within such power. *Margolin* v. *U. S.*, 269 U. S. 93.

The intent of the said statute—i. e., to be all inclusive and to operate on all alike—seems clear from the language used by the Congress; but, if not, recourse may be had to debates and reports which show that the Congress intended to and did fix a limit beyond which a fee may not be charged, or approved—i. e., a court has no jurisdiction to allow a fee contrary to the Federal Statute. (Congressional Record, Volume 56, Part 6, pp. 5220-26, April 17, 1918.) These debates show a definite view of Congress that the matter of a fee should

not be left to the discretion of courts—a view with the wisdom of which we are not concerned, as the Congress has a right to its own conclusions thereon.

While this Honorable Court has intimated, in *Hines* v. *Stein*, a view that there may be no necessity for limiting fees to be allowed by courts, the Congress may determine questions of fact and policy, as a basis for legislation, and such decision is final. *Gold Clause* cases, supra. *Ball* v. *Halsell*, 161 U. S. 72.

The Administrator of Veterans' Affairs intervened on behalf of the insane veteran pursuant to Section 450, Title 38, U. S. C., 49 Stat. 607, and Section 1384–t, Civil Practice Act, New York; and the overruling of his objections by the New York Court deprives the insane veteran of a right, privilege, or immunity granted by the Federal Statute.

This Court has jurisdiction as provided in Title 28, U. S. C., Section 344, Paragraph (b) to review, by certiorari, the action of the court below which, it is believed, erroneously construed the Federal Statute, and the decisions of this Court, and thereby deprived the insane veteran, represented by your Petitioner, of a right, privilege, or immunity granted by Federal Statute and which was appropriately claimed on his behalf.

The decision of the Supreme Court, Appellate Division, Second Department—in view of denial of appeal by the Court of Appeals—is a final decision of the highest court of the State having jurisdiction, and the writ of certiorari should be directed

to the said Supreme Court, Appellate Division, Second Department, State of New York. *Pa. Ry. Co. v. Commission*, 250 U. S. 566.

ASSIGNMENTS OF ERROR

The Supreme Court, Appellate Division, Second Department, New York, erred in affirming order of lower court "confirming the report of an official referee awarding to James J. Richman, an attorney, the sum of $1,500 for legal services rendered to an incompetent's estate in securing payment of war-risk insurance", contrary to the provisions of Section 500, World War Veterans' Act.

REASONS FOR ALLOWANCE OF THE WRIT

In view whereof Petitioner respectfully represents that the Writ of Certiorari should issue because:

1. In allowing said fee the court erroneously decided a Federal question adversely to Petitioner's contentions, and, it is believed, contrary to the purpose and intent of the Congress and the decisions of this Court.

2. The matter is one of importance not only to the insane veteran in this case but to thousands of other insane veterans of the World War, and final determination of the question will potentially affect decisions in every Probate Court of the Nation.

3. The decision and order of the New York Court operates a denial to the insane veteran, represented by Petitioner, of a right, privilege, or immunity granted by Federal Law, viz, the right not to have his estate depleted by an attorney fee in excess of

and contrary to the provisions of Section 500, World War Veterans' Act.

4. The allowance of a fee contrary to the provisions of the Federal Statute deprives the insane veteran of a right for which he contracted.

Attached hereto is the Brief of Petitioner in support of his petition for said Writ of Certiorari to which reference is respectfully made for discussion of the authorities in support of this petition and of the right claimed on behalf of the insane veteran.

Wherefor, your Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York, New York City, New York, to certify and send to this Court a full and complete transcript of the record herein, to the end that the cause may be reviewed and determined by this Court as provided by law, and that the order or judgment of the said New York Court may be reversed with costs, and for such other and further relief as may be appropriate and granted in the premises.

JAMES T. BRADY,
Solicitor, Veterans' Administration.
EDWARD E. ODOM,
Asst. Solicitor, Veterans' Administration.
JAMES A. CLARK,
Chief Attorney, Veterans' Administration,
New York City, New York.
Y. D. MATHES,
Asst. Solicitor, Veterans' Administration.

58162—38——3

In the Supreme Court of the United States

OCTOBER TERM, 1937

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, incompetent, for an order authorizing him to pay a fee to counsel for legal services rendered the estate

---

No. 945

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, UNITED STATES VETERANS' ADMINISTRATION, PETITIONER

v.

JAMES J. LOWREY, COMMITTEE OF THE PERSON AND ESTATE OF WILLIAM GARMES, AN INCOMPETENT PERSON, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW AND DATE OF JUDGMENT.

No opinion was rendered by the Supreme Court, Kings County, State of New York, by the Appellate Division, Second Department, State of New

York, nor by the Court of Appeals, State of New York; hence there is no citation.

The order of the Supreme Court, Kings County (R. 2–4) was affirmed by the Appellate Division, Second Department, October 23, 1937 (R. 81), and motion for leave to appeal was denied November 19, 1937 (R. 80). The Court of Appeals denied application to appeal January 11, 1938 (R. 80), the judgment, or order, of the Supreme Court becoming final on said date.

This Court has jurisdiction.

First. The sole question was one arising under the Federal Statutes, Section 500, World War Veterans' Act, viz, whether, despite the specific terms of said Statute, the attorney could charge and the court allow a fee in excess of $10.00. The attorney contended (R. 43) that this Court in the case of *Hines* v. *Stein*, 298 U. S. 94, "held unequivocably that Congress nowhere intended to interfere with the exclusive power of State Courts over the affairs of incompetents and that Section 500 did not place any such limitation on fees as contended by the Veterans' Administration." Petitioner contended that Section 500 was properly construed by the New York Courts in the case of *In re Shinberg*, 263 N. Y. S. 354, that said decision was controlling in this case (R. 32–33); that the decision in the *Stein* case, supra, construed certain pension statutes and Executive Orders (R. 47); and that the legislative history of Section 500 clearly showed an intention that "under no circumstances was an attorney to

receive any fee in connection with a claim for insurance other than as provided therein" (R. 47–48–51). The reasonableness of the fee dehors the statute was contested (R. 30–31, 69) but that question is one on which the decision of the State Courts would be final and not reviewable by this Court. The sole question, therefore, is the legality of the fee under the Statute—a Federal question.

Second. The power and authority of the United States Supreme Court to review the final judgment of the Supreme Court, Appellate Division, Second Department, State of New York is clear.

Pennsylvania Railroad Company v. *Public Service Commission of Pennsylvania,* 250 U. S. 566

In that case this Court reviewed a judgment of the Superior Court of Pennsylvania wherein the Supreme Court of Pennsylvania had denied an appeal.

Third. The right of the insane veteran, and the responsibility and duty of Petitioner to protect said right, arise from, and are imposed by, the Statutes of the United States; and there is involved a controversy respecting the construction and effect of a Federal Statute and the application thereto of decision of this Court.

Hines v. *Stein,* 298 U. S. 94

In that case this Court reviewed the judgment of the Superior Court, Allegheny County, Pennsylvania, appeal having been denied by the Supreme

Court, Pennsylvania, on the question of the legality of an attorney fee allowed by said court for services rendered in a claim under Federal pension statutes and Executive Orders. As in this case, the committee of an insane veteran was asking a fee for an attorney, and Petitioner opposed the fee on behalf of the insane veteran but under an Executive Order attempting to make the pension statutes applicable. The judgment of the Supreme Court, Appellate Division, New York, is contrary to decisions of this Court, it is believed, and the subject matter is such that this Court may and should consider, and determine the case on the merits, involving as it does the proper construction of the Federal Statute (Section 500 supra) limiting attorney fees and similar to that construed in

Capital Trust Company v. *Calhoun*, 250 U. S. 208

In that case, a proceeding in equity in a probate court (circuit court) of Kentucky to secure an accounting by the administrator, the attorney intervened by cross petition praying for judgment for an attorney fee based upon contract, as in this case, for services rendered in procuring payment of a claim against the United States; which fee was in excess of the limitation placed thereon by the Congress. The State Courts had allowed the fee as claimed; but this Court held that the limitation was binding on the attorney. It follows that it was controlling also as to the judgment in the State Courts.

In that case, likewise a suit against an estate in administration and involving a claim, based upon contract, for an attorney fee in excess of that prescribed by Congress in the Indian Claims Act of March 3, 1891 (p. 851, 26 Stat.), this court pointed out that in decisions prior thereto it had held valid contracts for contingent fees, by which attorneys had contracted (as in the instant case) to be allowed a fee in the event of success, and nothing in the event of failure to have the claim allowed; but that the Congress evidently had learned that to permit such contracts, with no fee limitation, may lead to extortion and oppression. It held that the Congress had the right to limit the fees, and that a suit for any amount in excess thereof could not be maintained by the attorney upon either a contractual or a quantum meruit basis. Again it follows that the judgment of the State Court was controlled by the Federal fee statute.

Fourth. The decisions of the State Courts wherein is involved the application of Section 500, supra, are in conflict with the decision in this case, and the point should be decided by this Court.

In re Copsey, 60 Pac. (2d) 121

In that case, which was on all fours with the instant case, an attorney acting for the guardian (sister) of an insane World War veteran prepared and filed with the Veterans' Administration a claim for

war-risk insurance, which claim was allowed and paid. Upon a petition filed by the guardian in the probate court (Superior Court, Mendocino County, California) an order was entered allowing her to pay the attorney a fee of $4,000. An appeal was taken by the Administrator to the Supreme Court of California on the ground that such fee is contrary to and prohibited by Section 500, supra. The attorney filed a motion to dismiss the appeal on the ground, among others, that the matter is governed by the decision of this Court in *Hines* v. *Stein*, supra, but the Supreme Court of California in refusing to dismiss the appeal, held that the *Stein* case is not determinative of the question in issue. In a later decision on the merits of the same case the California Supreme Court in effect reversed itself—see companion case filed herewith. This Court has jurisdiction to settle this point. *In re Copsey*, 76 Pac. (2d) 691.

Fifth. The Writ of Certiorari should be directed to the Supreme Court, Appellate Division, Second Department, State of New York, that being the highest court having jurisdiction of this cause since application to appeal was denied by the Court of Appeals, State of New York.

Pennsylvania Railroad Company v. *Public Service Commission of Pennsylvania*, 250 U. S. 566

That case involved a review of a judgment of the Superior Court of Pennsylvania wherein the Supreme Court of the State had denied an appeal.

STATEMENT

In the interest of brevity reference is made to the statement of material and essential facts set out in the Petition (pp. 6 to 10 hereof).

ASSIGNMENT OF ERROR

The Supreme Court, Appellate Division, Second Department, State of New York, erred in that—

1. It affirmed the order of the Supreme Court, "affirming the report of an official referee awarding to James J. Richman, an attorney, the sum of $1,500 for legal services rendered to an incompetent's estate in securing payment of war-risk insurance," in that

Said order is contrary to the specific provisions of Section 500, World War Veterans' Act (Sec. 551, Title 38, U. S. C.). Note: The question of the reasonableness of the fee *dehors the statute* is not subject to review by this Court. It will therefore be discussed only incidentally as it may illustrate the recognized need upon which the applicable legislation was based, its purpose, and the propriety and validity thereof.

SUMMARY OF ARGUMENT

1. In enacting Section 500, the Congress of the United States limited all fees for services mentioned therein; and that such limitation should be controlling as to all fees, whether in a State or Federal Court and on all *persons*.

2. While the Congress may not *directly* qualify the jurisdiction or procedure of a State Court, it

may and frequently does so indirectly, that is, by legislation upon a particular subject.

3. When the Congress has validly legislated on a *subject*, the law, as the supreme law of the Land, is binding upon all, and the judgments of courts are controlled thereby.

4. The necessity for the policy, and the factual basis for the legislation, is for the Congress to determine; and its determination if directed to a constitutional end is not reviewable.

5. The Legislative History shows the intent of Congress to limit fees otherwise allowable by courts.

6. Section 500 is therefore controlling as to fees allowable by State Courts for services stated therein.

7. State Courts of appellate jurisdiction have held uniformly that they have no jurisdiction to allow a fee contrary to Section 500.

8. The decision of this Court in *Hines* v. *Stein* did not construe said Section 500 and does not control, but the case is controlled by the Supreme Court decision in *Ball* v. *Halsell*, and *Capital Trust Company* v. *Calhoun, supra.*

9. The probate court has no power to waive the fee limitation.

10. Finally, the veteran contracted for the protection of the Statute, and the court must give effect to the fee limitation as a part of the veteran's contract.

The Statutes and authorities relied upon are set out in the Petition (pp. 11 to 14 herein).

ARGUMENT

Upon the above assignment of error the following argument is respectfully submitted.

1. In enacting Section 500, the Congress of the United States limited all fees for services mentioned therein; and that such limitation should be controlling as to all fees, whether in a State or Federal Court and on all *persons*.

The language of the Act, in pertinent part, is—

> Except in the event of legal proceedings under Section 19 * * * no * * * attorney * * * shall be recognized in the presentation and adjudication of claims * * * and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed $10 in any one case, * * *. *Any person who shall directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive* any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, * * *.

Can this language, enacted for the protection of all veterans and claimants for benefits, and by its clear terms made applicable to all persons in all claims under the Act be so construed as to deprive an insane veteran of such protection and to make

legal, because approved by a probate court, an act declared a misdemeanor by the law? This question, it is believed, has not been passed on by this Court; although the above-quoted language was construed in

Margolin v. *United States*, 269 U. S. 93

In that case the attorney Margolin had been convicted in the Federal District Court for a violation of the penal provisions of said Act. This was affirmed by the Circuit Court of Appeals (2nd Circuit) the court saying (3 Fed. (2d) p. 602):

> One Yetta Cohen retained the defendant to press, and secure the allowance of, her claim as beneficiary under a policy taken out by Joseph Freeman, her nephew, who died while enlisted in the United States Army. He had some correspondence with the Veterans' Bureau and made one trip to Washington to examine the records and interview the officials. It may be assumed that his services were of substantial service in procuring an allowance of Yetta Cohen's claim, and under any appraisal were worth many times the sum of $3. For them he demanded $2,000 and received $1,500.
>
> In his negotiations with the Bureau he must have been recognized as an attorney in the presentation of her claim, or his services could effect nothing. If he was so recognized, it was in the face of the statute, and he can recover nothing for services which he is forbidden to render. The act established

> a system designed to be self-executing. It makes no difference how well or ill it works. With obvious jealously of the mediation of agents or attorneys, who might fleece the beneficiaries, it excluded them from any share in its operation, except to draw up the simple papers. The system must get along without their help, and if the beneficiaries suffer more than they would if they could employ attorneys with the risk of extortion, *courts may not correct the blunder.* [Italics supplied.]

This Court, affirming the decision of the Circuit Court of Appeals, supra, after reviewing the legislative history of the statute, said:

> We find no reason which would justify disregard of the plain language of the section under consideration. It declares that any person who receives a fee or compensation in respect of a claim under the Act except as therein provided shall be deemed guilty of a misdemeanor. The only compensation which it permits a claim agent or attorney to receive where no legal proceeding has been commenced is three dollars for assistance in preparation and execution of necessary papers. And the history of the enactment indicates plainly enough that Congress did not fail to choose apt language to express its purpose.
>
> The validity of Section 13 construed as above indicated, we think, is not open to serious doubt.

It would seem that our inquiry should end here, the decision last above cited, construing as it did the statute applicable to the facts in the instant case, seeming to say that *under no circumstances* may a fee contrary thereto be received. But the State court held, in effect, that the purport of the decision of this Court in the case of *Hines* v. *Stein*, 298 U. S. 94, is that if Margolin had procured his $1,500 fee to be approved by a probate court in a guardianship proceeding it would not have been a violation of the statute.

Did this Court hold that despite Section 500 a State probate court has jurisdiction to allow a fee contrary to the provisions of said statute?

This Court said in that case (298 U. S. at p. 97):

> Petitioner submits that Congress, proceeding within its delegated power, directly, or through authorized executive action, has prescribed permissible fees for services such as those rendered by Sherrard, and directed how they may be paid. Also has inhibited payment of other or different sum in any manner.
>
> We need not consider the extent of Congressional power in this regard, since we are of opinion that, properly construed, the provisions relied upon do not apply where payments like the one here involved are directed by a state court having jurisdiction over the guardian of an incompetent veteran.
>
> The petition for certiorari asserts that the objections to respondent's application to the Court of Common Pleas were based upon

the President's Order of March 31, 1933 (Veterans' Regulation No. 10), permitted by Sections 4 and 7 of the Act of March 20, 1933, c. 3, 48 Stat. 9; "Instructions" promulgated by the Administrator under authority of that Order; and Sections 111, 114, and 115, Title 38, U. S. C. A."

Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to sanction *the promulgation of rules to that end by executive officers or bureaus.*

The broad purpose of regulations in respect of fees of those concerned with Pension matters is to protect the United States and beneficiaries against extortion, imposition or fraud. *Calhoun* v. *Massie,* 253 U. S. 170, 173. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with Pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought." [Italics ours.]

If by this decision it were meant that the Congress can in no way limit or affect the action or judgment of a probate (state) court, it would be clear that the answer to the above question would be in the affirmative. That such was not the meaning intended is believed apparent, not only from the language used by the court, but by reason of a long line of decisions holding that the Congress in enacting legislation, within its constitutional power,

on a specific subject, affects or controls the exercise of jurisdiction by State Courts on the subject of such Federal law. *Mondou* v. *Ry. Co.*, 223 U. S. 1, and cases cited. Further, this Court said in *Norman* v. *Ry. Co.*, 294 U. S. 240, at p. 309:

> The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt.

2. While the Congress may not *directly* qualify the jurisdiction or procedure of a State Court, it may and frequently does indirectly, that is, by legislation upon a particular subject, do so.

McCulloch v. *Maryland*, 4 Wheat. 316

This Court, speaking through Chief Justice Marshall, said at page 405:

> If any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all. * * *

and at page 426:

> This great principle is that the Constitution and the laws made in pursuance thereof are supreme, that they control the Constitution and laws of the respective states, and cannot be controlled by them.

Mondou v. *New York, New Haven, and Hartford Railway Company*, 223 U. S. 1

That was a case involving rights arising under the Federal Workmens' Compensation Act, and the State Courts had declined to take cognizance of certain provisions thereof. This Court said (p. 55):

> We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion * * *.

And at page 56:

> Because of some general observations in the opinion of the supreme court of errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by

local laws, is appropriate to the occasion and is invoked in conformity with those laws, *to take cognisance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure.* * * *

The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution adopted that act, *it spoke for all the people and all the States, and thereby established a policy for all.* That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this Court in *Claflin* v. *Houseman,* 93 U. S. 130, 136, 137; 23 L. E. 833, 838, 839 (p. 57):

"The laws of the United States are laws in the several states, *and just as much binding on the citizens and courts thereof as the state laws are.* The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. * * *

If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not

be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because *it is subject also to the laws of the United States, and is just as much bound to recognize those as operative within the state as it is to recognize the state laws.* The two together form one system of jurisprudence, which constitutes the laws of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. * * * It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of *Ableman* v. *Booth* (21 How. 506, 16 L. Ed. 169); and hence the state courts have no power to revise the action of the Federal courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

(At p. 58:)

"We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their

> jurisdiction, as prescribed by local laws, is adequate to the occasion." [Italics supplied.]

3. When the Congress has validly legislated on a *subject*, the law, as the supreme law of the Land, is binding upon all and the judgments of courts are controlled thereby.

Ball v. *Halsell*, 161 U. S. 72

That was an action on a written contract between one Halsell and an attorney, Ball, whereby the latter was to prosecute a claim, in favor of the former, against the United States, based upon alleged Indian depredations; and if successful to receive one-half of all moneys received. The claim was against the executrix of Halsell's estate. In the Indian Claims Act, March 3, 1891, Chapter 358, the Congress *prohibited any fee to an attorney other than as allowed by the Court of Claims* and then not to exceed 20% of the amount recovered, and made void any contracts to the contrary.

Mr. Justice Gray delivering the opinion of this Court said (p. 80):

> By several decisions of this court, indeed, beginning at December term, 1853, contracts for contingent fees, by which attorneys employed to prosecute claims against the United States were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid.

> Congress has evidently considered that, in some cases at least, to permit contracts to be made for the payment to attorneys, by way of contingent fee, of a large proportion of the amount to be recovered, is in danger of leading to extortion and oppression.

(At p. 83:)

> In view of previous experience, this last provision was a wise, reasonable, and just provision for the protection of suitors; and it was clearly within the constitutional power of Congress.

(At p. 85:)

> For the reasons above stated, Ball cannot maintain this action upon the contract between him and Halsell; and he does not sue, and could not recover, upon a *quantum meruit*.

Capital Trust Company v. *Calhoun*, 250 U. S. 208

That was a proceeding in equity against an executor for an accounting in a probate (circuit) court of Kentucky wherein the attorney, Calhoun, intervened and secured a decree ordering the executor of the estate of one Arnold to pay an attorney fee based upon a contract to prosecute a claim against the United States for a fee of 50% of any amount collected. The Court of Appeals of Kentucky affirmed the decree, 177 Ky. 518; 197 So. 944, and a writ of error to this court was sued out on the ground that the Congress had validly limited the attorney's fee to not to exceed 20% of the

amount recovered. In reversing the decree of the State Court this Court, speaking through Mr. Justice McKenna, said (p. 216):

> But the judgment is construed by the parties as having more specific operation, construed as subjecting the money received from the government to the payment of the balance of Calhoun's fee; doubtless because the estate has no other property. On that account it is attacked by the Trust Company and defended by Calhoun. The controversy thus presented is discussed by counsel in two propositions: (1) The validity of the contract independently of the limitation imposed by Congress upon the appropriated money; (2) the power of Congress to impose the limitation as to that money. The latter we regard as the main and determining proposition; the other may be conceded, certainly so far as fixing the amount of compensation for Calhoun's services.

(At p. 217:)

> We, however, need not dwell upon the distinctions (their soundness may be disputed), nor upon the contentions based upon them, because, as we have said, we consider the other proposition, that is, the power of Congress over the appropriated money and the limitation of payment out of it to an agent or attorney to 20 per cent of the claim, to be the decisive one.
>
> In its discussion counsel for Calhoun have gone far afield and have invoked many propositions of broad generality, have even

adduced as impliedly against the power, if we understand counsel, the constitution of the court of claims and its jurisdiction, as weight in the same direction.

(At p. 218:)

In a general sense there is force and much appeal in the contentions, but we think they carry us into considerations beyond our cognizance. Liberty in any of its exertions and its protection by the Constitution are of concern. The right to bind by contract and require performance of the contract are examples of that liberty and that protection, and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate. But there are other elements to be considered, *there is the element of the condition Congress imposed on the subject-matter of the controversy, regarded as a condition of its grant.* [Italics ours.]

(At p. 219:)

The contention (i. e. that the legislation was beyond the constitutional power of Congress) "has no legal basis, and it may be said it has no equitable one. Neither the justice nor the policy of what sovereignty may do or omit to do can be judged from partial views or particular instances. It is easy to conceive what difficulties beset and what circumstances had to be considered in legislating upon such claims. Definite dispositions were matters

> of reflection, and, it may be, experience, imposition was to be protected against as well as just claims provided for; and, considering claimants and their attorneys in the circumstances, it may have seemed to Congress that the limitation imposed was fully justified—that 20 per cent of the amounts appropriated would be a proper adjustment between them. We are not concerned, however, to accuse or defend. Whatever might have been the moving considerations, the power exercised must be sustained.

And in *Calhoun* v. *Massie*, 253 U. S. 170, this Court held that the limitation as to the fee is not confined to the proceeds of the Constitutional grant.

4. The necessity for the policy, and the factual basis for the legislation, is for the Congress to determine; and its determination if directed to a constitutional end is not reviewable.

When the Congress has exercised its constitutional prerogative in legislating on a *subject*, for example bankruptcy, currency, or commerce, State laws, statutory or common, and State court jurisdiction are affected and controlled thereby; and the determination of the *necessity* for such legislation is a legislative, not a judicial, function.

Norman v. *B. & O. Railway Co.*, 294 U. S. 240

In that case, and in the other *Gold Clause* cases decided contemporaneously, the opposition was directed to the power of Congress with particular respect to the due process and impairment of con-

tract provisions of the Constitution. In sustaining the legislative power this Court, speaking through Mr. Chief Justice Hughes, said:

> Here, the Congress has enacted an express interdiction. The argument against it does not rest upon the mere fact that the legislation may cause hardship or loss. * * * And the contestants urge that the Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred.

(At p. 307:)

> This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

(At p. 311:)

> That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. *With respect to those conditions and determinations, the Congress is entitled to its own judgment.* We may inquire whether its action is arbi-

trary or capricious, that is, whether it has reasonable relation to a legitimate end. If it is an appropriate means to such an end, the decision of the Congress as to the degree of the necessity for the adoption of that means, is final. [Italics supplied.]

5. The Legislative History shows the intent of Congress to limit fees otherwise allowable by courts.

Since legislation on a subject, or as to persons, is controlling as to jurisdiction of courts, and since the language of Section 500 seems sufficiently broad as to include all persons and all courts, the argument that a probate court has jurisdiction to allow a fee contrary thereto must be based upon the proposition that the Congress *did not intend* to limit the jurisdiction of State Courts as to fees that may be allowed in preparing and filing claims for war risk insurance (or for other benefits included in Sec. 500).

Did the Congress consider that there was necessity for limiting fees to be allowed in such cases by State courts, and if so did it evidence its intent by apt language in the legislative enactment?

This court took judicial notice, in the *Margolin* case, *supra*, of the committee reports on the Bill. The debates in the House of Representatives on this section reported in the Congressional Record, Volume 56, Part 6, pp. 5220–26, April 17, 1918, are contained in part in the record in this case (R. 48–

51). Portions of the debates believed pertinent are as follows:

Mr. RAYBURN. The only reason on earth for the introduction and report of this bill and the asking for its consideration is that since the passage of the war-risk insurance act, like what happened under the pension act to some extent, organizations of lawyers have been formed from one end of this country to the other, so-called lawyers, who have been preying upon the ignorance of the people who are the beneficiaries of the act for insurance, compensation, and allotments.

Mr. MOORE of Pennsylvania. That ought to be stopped.

Mr. RAYBURN. That is exactly what we are trying to stop, and that is the only thing this bill seeks to do.

* * * * * *

Mr. TREADWAY. The reason for the introduction of this measure is very plain. I desire to call attention to a sentence in section 13 of the war-risk insurance act approved October 6, 1917, which reads as follows:

"The director shall adopt reasonable and proper rules to govern the procedure of the divisions to regulate the matter of compensation, if any, but in no case to exceed 10 percent, to be paid to claim agents and attorneys for services in connection with any of the matters provided for in Articles 2, 3, and 4."

Now Articles 2, 3, and 4, are the allowance, compensation, and war-risk insurance, so that you see whatever was done under the authority of a claim agent entitles that agent to receive 10 percent of the benefits derived by the beneficiary from the Government. In other words, take, as an illustration, a $10,000 war-risk insurance policy. Such a policy would not be paid in a lump sum of $10,000, but would cover a period of 20 years, or 240 months.

Now, then, during the entire life of that policy the claim agent who has presented the claim to the War Risk Bureau can demand the 10-percent commission for those services.

Undoubtedly, that was a mistake in the framing of the bill. The bill never was so intended. The department did not intend, the gentlemen who offered the war-risk insurance bill did not intend, nor did the Committee on Interstate and Foreign Commerce intend that any such opportunity should be given to the claim agent. We have not heard, however, of any claim agent objecting to that phrase in the bill up to the present time. It is a very nice opportunity, and one which is being rapidly made use of.

* * * * *

Unless there is still some joker we have not discovered (italics supplied), enactment of this bill will absolutely prevent applications being made by claim agents in behalf of beneficiaries under the act who would prevent them from obtaining all that is justly their due.

* * * * *

Mr. JUUL. I should like to ask the gentlemen if the penalty clause in this bill may not be misunderstood, and should it not provide an exception in favor of people who legally represent claimants when there is a dispute between the Government and the claimant?

Mr. TREADWAY. That must come through court action. There could be no question of any discrepancy in that feature.

Mr. JUUL. But, if the gentlemen will pardon me, in line 22 you provide a penalty against anyone who shall negotiate with anybody——

Mr. TREADWAY. It is intended that it should.

Mr. JUUL. I understand; but there are cases where attorneys are permitted by the bill, and you do not except those attorneys from the penalty.

Mr. TREADWAY. May I call the gentleman's attention to the fact that there are two places where attorneys or claim agents are recognized? One is in the preparation of the papers and the execution of necessary papers, where not to exceed $3 may be charged. That is simply a clerical service. Then, you will see the bill also recognizes attorneys in connection with a suit.

Mr. JUUL. Yes.

Mr. TREADWAY. There is no other place where the claim agent can legally perform services, and it is not intended that there should be.

Mr. JUUL. My question to you is whether or not you are providing a penalty for the attorney who properly represents the claimants before the Government, where there is a dispute as to the appointment and who the claimants are?

Mr. TREADWAY. If the gentleman will read lines 10 to 21, I think he will get the information; but I would be glad to take it up with the gentleman any time.

* * * * *

Mr. JUUL. Suppose there is a disagreement as to who is the legal claimant in the case; may the one who is decided by the department not to be the legal claimant go to his attorney and say, "I, and not the other man, am the legal claimant," and if he does, is the attorney to be subjected to a penalty because he negotiates?

Mr. SNOOK. No; not if he negotiates, but if he charges a fee not authorized by the law. There will be no trouble about the attorney making out affidavits or making the proper proofs. Hundreds of attorneys in this country are representing soldiers and are making proofs for them and drawing affidavits and all that.

* * * * *

Mr. LINTHICUM. Is not the gentleman wrong when he says that it provides a 10 percent fee? Does not the law provide not exceeding 10 percent?

Mr. GREEN of Iowa. If the gentleman has practiced law, as I presume he has, I will

ask if he ever knew of a court cutting down those fees?

Mr. LOBECK. And the gentleman has had experience as a judge, too?

Mr. GREEN of Iowa. The gentleman will excuse me from answering that. I am not speaking from the standpoint of a judge, if I was, I would say the attorney always claims to have earned the fee.

* * * * * *

Mr. DEWALT. Now the gentleman from Iowa takes the position that the courts would always fix 10 percent, and says that his experience as a lawyer is that they uniformly do that. I am sorry to hear the gentleman admit that he practices in a jurisdiction of that kind (laughter).

I know Iowa to be one of the most reputable States in the Union, and I have no doubt the gentleman comes from one of the most reputable communities in that State, and its judiciary should be above and beyond any such suspicion. My experience, not only in the district courts but in the court of common pleas, has been that when they have a right to fix compensation they favor the claimants and make the fees rather low instead of high for the attorneys.

Mr. MADDEN. What would the gentleman say about fixing a limit on the amount.

Mr. DEWALT. I think that would be a wise provision, and I would stand for an amendment of that sort.

* * * * *

Mr. GOOD. Mr. Speaker, I hope the committee will accept an amendment to the sec-

ond paragraph. It will be observed that the second paragraph reads as follows:

"Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor."

It seems to me the words "except herein provided" should be stricken out, and that we should insert "in excess of the fees or compensation herein provided."

* * * * *

Mr. RAYBURN. I have considered the amendment suggested by the gentleman from Iowa (Mr. Good), and I am firmly convinced that the language of the bill is better than the language that he suggested, although he may be right and I may be wrong.

On another occasion the Congress expressed opinions as to attorney fees allowed by, or procedure in, state courts. On June 26, 1926, the Senate was debating that part of a Bill which is now Section 450, Title 38, U. S. C.—the law whereunder the Administrator of Veterans' Affairs was required to appear in the State Court in the instant case and object to the fee as illegal or "in excess of that allowed by law."

(Congressional Record, Vol. 67, No. 166, P. 12079:)

Mr. ROBINSON of Arkansas. My information is that the retention of this House language will give the Veterans' Bureau a

standing and enable it to protect the veterans against the practices which are implied in the charges against * * *.

* * * * *

Mr. REED of Pennsylvania. * * * Quite seriously, we are in full agreement with what the Senator has said about the impropriety, but we did not think it was right to have the Veterans' Bureau usurp the authority of the State Courts which appoint these guardians. What we have done has been to adopt the House language, which the Senators will find on the following page of the bill, which gives the director authority to go into these courts of appointment whenever he finds anything to take exception to in the conduct of a guardian, gives him standing to interplead, as it were, and ask the removal or the surcharge of the guardian.

* * * * *

Mr. REED of Pennsylvania. It is a question of State rights, and we simply did not want to intrude too far.

* * * * *

Mr. DILL. The Senator says that we do not want to interfere with these courts, but the Senator knows that the Congress cannot reach the courts but the Congress can reach the director if he does not protect these people in his charge.

Mr. HEFLIN. It makes no difference who appoints them.

Mr. DILL. The history of the matter shows that the courts did not protect them, and

therefore Congress ought to, by this legislation.

Mr. REED of Pennsylvania. In this legislation we give the director authority to go into any State Court and we provide for the payment of the necessary expenses and fees in doing so. We thought—perhaps the Senate will disagree with us—that that was as far as we ought to go in the recognition of the independence of the several States in the appointment of conservators and guardians.

* * * * *

(At p. 12082:)

Mr. GEORGE. Mr. President, it strikes me that there has been a great deal of emotionalism displayed here about a very simple matter, and I wish to say something about it.

It is quite true that when a guardian embezzles the funds of his ward or for any other reason ought not to continue as guardian, we may feel a righteous indignation against the guardian; but it is quite a different thing to override the established tribunals of the country because of a particular case or because of a flagrant abuse that may have been brought to light with respect to a particular case and to reject a principle written in the law that is consonant with sound policy.

There is not a shadow of doubt that the Congress appropriating money for the disabled veterans, may safeguard that money; and there is not a shadow of doubt that the Director of the Veterans' Bureau may be

given authority to appoint a guardian for the ward or to withhold the payment of money to the guardian if for any reason he finds that the guardian is commercializing the infirmities and the afflictions of the ward. Congress has that power, undoubtedly, but it seemed to many members of the Committee that it was a sounder policy to recognize the validity of the appointment of a guardian by the State of Virginia or the State of Alabama or the State of Georgia or the District of Columbia and allow the director of the bureau to go into the court and bring to the attention of the court any irregularity or any misconduct upon the part of the guardian.

* * * * *

Mr. DILL. The Senator says he is a ward of the State Court. I do not care whether he is a ward one way or the other. The fact remains that these men are taken care of at the expense of the Federal Government; and if any State court in its action fails to protect these men, then I think Congress ought to provide that the man who is under the direction of Congress, namely, the director, should protect them.

* * * * *

This debate followed extensive hearings and investigations had or made by a Select Committee of the Senate on Guardianship matters, which resulted in an amendment to the World War Veterans' Act providing in part, "Whenever it appears that any guardian * * * or other per-

son * * * has collected or is attempting to collect fees * * * that are inequitable or are in excess of those allowed by law * * * the director(Administrator) is hereby empowered by his duly authorized attorney to appear in the court which has appointed such fiduciary and make proper presentation of such matters to the court."

It is not to be presumed that the Congress would require the Administrator to make such representations, as to "fees * * * in excess of those allowed by law," without being convinced of the necessity for such action.

6. Section 500 is therefore controlling as to fees allowable by State Courts for services stated therein.

It is believed that the legislative history clearly shows that the Congress was of the opinion that *all* veterans, sane or insane, and whether sued in court on a contract or in a guardianship proceeding, needed, and that it was the intent to afford, protection against attorney fees in excess of those fixed by the Congress as proper and allowable. Further, that as to insane veterans under guardianship, and therefore under the protection of the State Courts, the Congress has—not once merely but many times, and after exhaustive investigations and hearings—determined that they need added protection. As said by this court in *Spicer* v. *Smith*, 288 U. S. 430, the Congress showed a purpose "to safeguard to beneficiaries the appropriations and payments made for their benefit * * *

and evince special solicitude for the protection of veterans who by reason of mental incompetency are unable to protect themselves." If a sane veteran, or beneficiary, is entitled to protection against excessive attorney fees (*Margolin* case, *supra*), why, especially in view of the expressed Congressional solicitude, should not insane veterans be entitled to the same protection?

Why should not the limitations as to attorney fees be binding upon the State Courts the same as those with respect to taxation, Section 454a, Title 38, U. S. C., contained in the same original Act and carried forward in all subsequent amendments thereto?

Lawrence v. *Shaw*, 300 U. S. 245

This court held such limitations as to taxation of the funds paid a guardian of an insane veteran, and deposited by him in a bank, valid and controlling even as against the sovereign power of a State, and reversed the Supreme Court of North Carolina which had affirmed an order of the Superior Court, the court having jurisdiction of the guardianship.

7. State Courts of appellate jurisdiction have held uniformly that they have no jurisdiction to allow a fee contrary to Section 500.

Prior to the present case no State Appellate Court has ever held that Section 500 is not absolutely controlling as to jurisdiction to allow attorneys' fees in connection with the claims for bene-

fits under the World War Veterans' Act, as amended. The *Stein* case, arising in the Superior Court, Allegheny County, Pennsylvania, involved the pension acts and Executive Orders, but not Section 500. *In re Stein*, 180 Atl. 577. One of the clearest expositions of the doctrine that the State probate courts are, and should be, bound by the Federal Statute is contained in a case decided in the Supreme Court, Appellate Division, First Department, New York. *In re Shinberg, Hines* v. *Schwartz*, 253 N. Y. S. 354, 238 A. D. 74.

In that case the attorney, Schwartz, acting for the committee for the insane veteran, filed an action prematurely in the Federal District Court, Eastern District of New York, on the contract of insurance. Said suit was voluntarily dismissed, whereupon the claim was paid. The committee secured from the probate court (Supreme Court, First Department, New York) an order to pay the attorney a sum equal to 10% of the amount received. The Administrator of Veterans' Affairs filed an application pursuant to New York practice to vacate the order, which was denied, but the Appellate Court reversed the Supreme Court, saying:

> The respondent contends that inasmuch as the settlement was made after the claim had been denied by the government, and after he had instituted an action in the United States District Court, he is not bound by the $10 limitation.

All the parties connected with the litigation speak in very glowing terms of the able services rendered by the respondent in behalf of the incompetent. Mrs. Shinberg, the wife of the veteran, has submitted an affidavit in which she avers that her husband would not have received anything if it had not been for the services of the respondent, Sanford N. Schwartz.

The appellant contends, however, that it is his duty to object to the allowance made by the court, in view of the provisions of Title 38, U. S. Code Annotated, Section 551, to the effect that the payment of any claim agent or attorney for assistance in the preparation and execution of necessary papers in any application to the bureau shall not exceed $10; that wherever a decree or judgment shall be rendered in an action, the court shall determine and allow reasonable fees for the attorney not to exceed 10 percent of the amount recovered, the respondent is bound by the provisions thereof, and not having applied for a decree or judgment he becomes a creditor against the estate of the incompetent person.

We are confronted with the emphatic language of this statute, which provides that an attorney must not take more than $10 for services rendered to an incompetent person, unless a judgment or decree is entered, at which time the court must provide in said judgment or decree for the allowance of a reasonable fee not to exceed 10 per centum of the amount recovered and to be paid

This statute was considered in *Welty* v. *United States* (C. C. A.) 2 Fed. (2d) 562, where the court held that the statute does not prevent a guardian, or other person, paying out of his own funds compensation to an attorney for his services, but that the estate of the ward should not be taxed with an additional fee unless suit is filed.

In *Purvis* v. *Walls et al.*, 184 Ark. 887, 44 S. W. (2d) 353, an attorney was indicted for taking more than the fee permitted by statute. He accepted $1,380 for securing benefits under war risk insurance, similar to those secured in this case. After a trial in the District Court he was convicted, and on appeal the conviction was affirmed. *Purvis* v. *United States* (C. C. A.) 61 Fed. (2d) 992. Judge Kenyon wrote an opinion for the Circuit Court of Appeals in which he held it to be a crime to take more than the $10 allowed by statute, unless such allowance is made as provided by law. See also *Lopez* v. *United States* (C. C. A.) 17 Fed. (2d) 462; *Margolin* v. *United States*, 269 U. S. 93, 46 S. Ct. 64, 70 L. E. 176.

In the *Matter of Zadurin's Estate*, 142 Misc. 24, 25, 253 N. Y. S. 652, 653, the surrogate of New York County in a similar case disallowed a claim of $1,500 stating: "This court will not affirmatively join in a violation of the rules governing attorneys' fees in such Federal matters as the war-risk insurance. The amount involved in the assignment does exceed the allowance per-

mitted by the Federal rule. * * * The claim in the sum of $1,500 is disallowed."

The argument is here made that suit was brought in the present instance. It must be admitted, however, that the suit was discontinued and the claim settled by the government with the committee for the incompetent.

This is not a case where a judgment or decree was entered. Although the statute does say that the $10 limitation applies where no suit has been filed, nevertheless it also provides that any allowance to be made where a suit has been filed must be made in the judgment or decree growing out of that action.

There may be cases where the enforcement of this statute will result in a hardship. Admitting that this may be such a case, nevertheless the necessity for such a statute must be apparent, especially in view of the great need of protection for people who really are wards of the court and who, in the absence of such statutory provision, would, in many cases, be preyed upon by the unscrupulous. Because it safeguards and protects the unfortunates who are wholly dependent upon the government for support, this statute should be rigidly enforced.

In the present case, the court has no power to award any portion of the war-risk insurance to the attorney for the committee of the incompetent. The order should be reversed, and the motion granted.

Order reversed, and motion granted. Order filed. All concur.

Hines v. *McCoy*, 159 So. (Miss.) 906

That was a guardianship case in Mississippi wherein the guardian claimed credit for attorney fees in the amount of $1,300 for securing payment of war-risk insurance, which fee was allowed by the Chancery Court having jurisdiction. On appeal by the Administrator the Supreme Court of Mississippi reversed the Chancellor's decree saying:

> The main argument in justification of the allowance of the $1,300 fees, and the chancellor's act in sustaining the demurrer to the petition of Hines, the administrator of veterans' affairs, is that the chancery court is not controlled by the federal authorities in the administration of estates, after the money has passed into the hands of the guardian, and that the federal administrator has no standing to intervene and question any act done in the administration, because he has no such interest as would warrant his intervening, and that it would be a meddling by bureaus of the federal government to allow a federal administrator to control the state courts.
>
> We do not think this contention can be maintained. There is no effort, as we understand the proceeding here, for the federal government to undertake to control the state court, but the government seeks to see that the money allowed to war veterans through insurance is properly and economically administered. The federal government has the right to provide, as a condition of the policies and the allowances, as it has provided,

that not more than a given amount ($10) shall be allowed for procuring the money from the government for war veterans. If a suit is necessary, the federal act provides that same may be brought in a federal court, and that that court may allow a reasonable attorney's fee. There is nothing in the petition by the guardian for the allowance showing that the chancellor entered any finding that the $1,300, or any part of it, was allowed by the federal government for services rendered in procuring the insurance. On the contrary, the federal administrator shows that there was no such proceeding.

(1) The United States has a standing in the courts of this state to assert any rights it has, or may have, of a justiciable nature.

(2) It appears to us that, by the rules of comity, the veterans' administrator should be permitted to come into court and challenge any improper allowance of the money received from the government. It certainly would not be contrary to public policy so to do.

The appellant, therefore, was authorized to intervene and challenge the allowance. Under the allegations of the petition of Frank T. Hines, to which the demurrer was allowed, the fee was clearly excessive, and there was no specification of items in the administrator's petition for allowance showing what the services were for, whether they were for procuring the money from the government, or whether for the filing of the two annual accounts. We think the allegations

> of the petition were sufficient to require an answer, and the court should hear evidence on both sides and determine the cause in the light of such hearing.

To the same effect is the decision, *In re Minor*, 145 So. 507. That the rule stated in these decisions was not changed by this court's decision in *Hines* v. *Stein* was held by the Supreme Court of California in

In re Copsey, 60 Pac. (2d) 121.

That was a guardianship case in the Superior Court, Mendocino County, California, wherein the sister and guardian of an insane veteran employed an attorney to file a claim on his war risk insurance contract. The papers were prepared and claim filed, and paid without suit as in the instant case. The Superior Court, on the guardian's application, allowed the attorney a fee of $4,000 for such services. An appeal, based as in the instant case, on Section 500, was filed by the Administrator, and the attorney filed a motion to dismiss the appeal urging certain alleged defects of procedure—among others that the administrator was not a proper party—but principally that the matter had been disposed of by the decision of this Court in *Hines* v. *Stein*. The California Supreme Court in refusing to dismiss the appeal said (p. 123):

> Respondent has directed our attention to a recent case decided by the United States Supreme Court, *Frank T. Hines* vs. *Minnie*

Stein, as guardian, etc., 56 S. Ct. 699, 701, 80 L. E. 1063, decided April 27, 1936, which he claims is conclusive of the present appeal. In that case the administrator of veterans' affairs objected to an attorney's fee, which was allowed by the local court to an attorney for special services rendered by him in the guardianship matter, on the ground that the same was in excess of the amount fixed by the federal statutes and in the president's order promulgated thereunder. Practically the same contentions made by the appellant in the present guardianship matters were made there. The Supreme Court of the United States held in that case that, "We find nothing in any of these acts of congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them." It accordingly affirmed the order of the court of common pleas fixing and allowing said attorney's fees. But in that case the appellant admitted that the services were rendered by the attorney and that the charge was reasonable. While the appellant in his brief does not stress the point that the charge of $4,000 for extraordinary services rendered by the attorney in the Copsey guardianship matter was unreasonable, he does not expressly or by implication in any stage of these proceedings admit its reasonableness. *This distinction between the two cases deprives the cited*

> *case of any authoritative force upon the hearing of respondent's present motion to dismiss.* Incompetent persons are made the special wards of the court, and it is the duty of the court to protect them and their property, whenever it appears from the records in any proceeding before the court, that such action is necessary or advisable. [Italics supplied.]

This decision was, in effect, reversed by the Supreme Court of California in deciding the case on the merits (76 Pac. (2d) Adv. 691), but in its later opinion that Court said (p. 693):

> *In view of the fact that incompetent persons are made the special wards of the court, and it is the duty of the court to protect them and their property (Guardianship of Copsey, supra), it would seem to follow as a matter of reason and logic that attorneys' fees, in excess of the schedule set out in Section 551, Title 38, United States Code, as permissible to be allowed an attorney for a competent veteran, could not be validly allowed the attorney for the guardian of an incompetent veteran. Several state courts have so held. (In re Shinberg,* 263 N. Y. S. 354; *In re Roy C. Minor* (Miss.), 145 So. 507; *Hines v. McCoy* (Miss.), 159 So. 306. *If the government is zealous to protect competent veterans from unreasonable expense in the collection of their claims for government aid, with how much more reason should the estates of incompetent veterans be protected from excessive charges. We are, however,*

> *squarely faced with the recent decision of the United States Supreme Court in the case of Hines* v. *Stein, as guardian, etc.*, 298 U. S. 94, decided April 27, 1936, * * * [Italics ours.]

There is a further distinction, viz, that it was the clear intent of Congress that Section 500 shall be controlling upon all courts or persons, as a valid exercise of legislative power on a *subject* within its constitutional authority—in short that the necessity and intent, said in the Stein decision not to be apparent in the pension acts and Executive Orders, is clearly evident in Section 500 read in the light of its legislative history, and that of concomitant sections. This will be more fully discussed in the Brief accompanying the petition being filed contemporaneously (Copsey).

In what more apt language could the prohibition have been expressed to show such intent? From time immemorial the same language has been used in acts authorizing appropriated moneys to be paid *direct to guardians.* For example observe Private Act No. 563, 74th Congress. [Italics supplied.]

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury is hereby authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, *to the legal guardian of Randall Krauss,* a minor, of Yakima, Washington, the sum of $60 per month until he attains the age of

twenty-one, in full satisfaction of his claims against the United States for the death of his father, mother, and sister, who were killed when struck by a United States Army airplane which crashed at Griffith Park, California, on June 20, 1935: *Provided,* That payments hereunder shall begin on the first calendar day of the month following the approval of this Act; *Provided further, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding.* Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000."

Could the attorney have frustrated the Congressional intent by having the probate court approve a fee in excess of that stated by the Act?

8. The decision of this Court in *Hines* v. *Stein* did not construe said Section 500 and does not control, but the case is controlled by the Supreme Court decision in *Ball* v. *Halsell,* and *Capital Trust Company* v. *Calhoun, supra.*

That this Court was not considering Section 500 in the *Stein* decision seems clear from the following language:

> The petition for certiorari asserts that the objections to respondent's application to the

Court of Common Pleas were based upon the President's Order of March 31, 1933 (Veterans' Regulation No. 10), permitted by § 4 and 7 of the Act of March 20, 1933, c. 3, 48 Stat. 9; "Instructions" promulgated by the Administrator under authority of that Order; and § 111, 114, and 115, Title 38, U. S. C. A.

Section 500 is Section 551, Title 38, U. S. C., and is the law of the land, dependent upon no Regulation or order.

It was not, and is not, as was said to be done in the *Stein case*, admitted that the atto ney fee *dehors the statute* was reasonable (R. 71–73). The question was fully presented to the state courts, the record is full of testimony of the attorney purporting to show he earned a fee of $3,000, and of counter contentions that the services were not worth over $10 as fixed by Section 500 (R. 114–146). But the matter is not labored here; for if the State Court had any authority of law to allow any fee in excess of that stated in ne Federal Statute then the decision of the State Appellate Court on that question would not be reviewable by this Court. And this would be true of the $4,000 fee allowed by the California Superior Court in the *Capsey case*. It was to settle such matters that Congress enacted the fee limitation.

The contract made by the guardian is clearly illegal unless construed—as it may be—in consonance with Section 500. That is, if suit in the

Federal Court had been necessary, as probably was contemplated, then, in the event of success the fee would have been "fixed by the court"—the Federal District Court—at not to exceed 10 per cent of the judgment as provided by said Section 500. Any other contract would be illegal as held by the 8th Circuit Court of Appeals in *Purvis* v. *United States*, 61 Fed. (2d) 992, and by the Court of Appeals, District of Columbia, in *Conlon* v. *Adamski*, 77 Fed. (2d) 397.

In the latter case the Court of Appeals (D. C.) said (77 Fed. (2d), p. 397):

> Appellant James Conlon and appellee Roman Adamski on September 11, 1933, entered into a contract in writing whereby appellee employed appellant as attorney to bring a mandamus proceeding in the Supreme Court of the District of Columbia to enforce the payment of a claim alleged to be due him upon a war risk insurance policy for the sum of $8,740. According to the contract, out of this claim, appellant was to be paid for his services in the sum of $2,500.
>
> Assuming, however, though by no means conceding, that section 3477, R. S. supra, is inapplicable to the present case, appellant's contention would not be improved, since he comes in conflict with the provisions of Section 551, Title 38, U. S. C. (38 U. S. C. A., Section 551), which makes it a criminal offense under any circumstances "'to solicit, contract for, charge, or receive, any fee or compensation" in excess of 10 per centum of

the amount recovered in such a proceeding. *Conlon* v. *Adamski*, 77 Fed. (2d) 397.

In the former the court (8th Circuit) declared (1 Fed. (2d), p. 998):

> The proposition urged that federal statutes cannot prescribe the qualifications of suitors in state courts is beside the point. Here there has been no attempt to do so. Appellant had an undoubted right to make a contract with the Walls for compensation for his services, and to sue thereon; but the amount of the compensation contracted for, or sued for, must not exceed the maximum allowed by the statute for the particular services rendered. The question is not one of appellant's right to make a contract, or to sue thereon—it is whether he attempted thereby to secure or receive a fee in excess of that allowed by Section 551, supra. If he did, then he has violated that statute. *Purvis* v. *United States*, 61 Fed. (2d) 992.
>
> There is no reason why Congress, having created a plan of war risk insurance for the benefit of the soldiers, may not limit the compensation an attorney or agent may receive for assisting the beneficiary in securing benefits due him. Congress can impose such limitations in this connection as it may deem desirable. If a contract for compensation for services rendered in securing payment of war risk insurance claims were a legitimate defense where an attorney is charged with soliciting or receiving fees prohibited by the statute, a large loophole would

be opened for circumventing the statute by all manner of subterfuge.

Similarly with the statute involved in the instant case, there is no ambiguity, the language is clear and it was undoubtedly adopted by Congress to prevent the fleecing of beneficiaries under these war risk insurance certificates, and, if an attorney or agent is not willing to abide by the statute and run the risk of receiving only $10 as a fee for all work done in case suit is not brought, he is under no obligation to take the case. He cannot avoid the provisions of the act by any contract. *Lopez* v. *United States* (C. C. A.), 17 Fed. (2d) 462. The alleged contract in the instant case is no defense.

There is a further distinction between Section 500 and the Regulations and laws considered in the *Stein* case, in that Section 500, except in case of a judgment in a Federal District Court, does not confine prohibition of payment of the fee to *benefits* received under the act, but prohibits absolutely any fee in excess of $10 for services rendered the veteran or on his behalf in connection with a claim.

This phase of the statute was given extensive examination in a case which was decided by the Circuit Court of Appeals, 6th Circuit.

Welty v. *United States*, 2 Fed. (2d) 562

The decision in that case was solely on the point that defendant was entitled to an instruction as to the meaning of Section 13, War Risk Insurance Act (Section 500 here involved). The Circuit

Court of Appeals reversed the lower court which had refused defendant's requested charge therein. The discussion therefore is mentioned here not as direct authority, but as illustrative and because of its persuasive application to the instant case. Judge Mack stated the controverted facts as follows (p. 563):

> Franklin R. Strayer became insane only a few days after his arrival in camp. His father maintained him at a sanitarium, incurring heavy expenses. An application for compensation under the War Risk Insurance Act had been refused, on the ground that the condition did not arise while he was in the service. Defendant, who had been a Congressman, was then applied to by the father. The conflict in the facts is whether he was to receive for his services, if successful in securing compensation under the act for Strayer and payment therefrom to the father for the expenses incurred by him on behalf of the son, one-third of the compensation so to be secured for the son, or whether his employment was solely by and on behalf of the father, and his payment to be made solely by the father, of one-third of such sum as might be allowed to the father because of the expenses incurred by him for his son, plus any expenses to which the defendant might be put in the matter.

After mentioning the view that the statute undoubtedly is within the constitutional power of Congress, and the belief that it did not cover a fee that

might be paid gratuitously by a third person, the court stated—

> the necessary construction of the statute under the rules governing penal acts is to limit the prohibition to payments to be made *by or out of the funds of the applicant and to dealings with him or on his behalf*. [Italics supplied.]

(At p. 564:)

> As we interpret the statute, it permits a charge of $3 to the applicant himself for services in the preparation and execution of the necessary papers, and prohibits any charge whatsoever to him for any additional services in the prosecution of the claim. Even though claim agents and attorneys are not to be recognized in the presentation or adjudication of claims, the rendering by them of services in the prosecution of the claims, gratuitously so far as the applicant is concerned, is not forbidden.
>
> The vital question in this case was whether or not the defendant indirectly solicited or received compensation out of the funds that belonged to the insane applicant, or whether his dealings were entirely with and on behalf of the father and his compensation to be paid solely out of anything that the father might justly recover from the estate of his son.
>
> If, as the government contends, the amount received was not made up of items of expenses actually incurred under agreement for reimbursement by the father out

of his own funds, plus one-third of the balance of the father's fund, that fund being his just claim as allowed by the state court against the estate of his son for expenses actually incurred by him and services actually rendered by him to the son—if, in other words, these proceedings were more or less of a subterfuge intended to hide the actual transaction, and if the actual agreement, though made with the father, was made by him on behalf of his son, and was that the defendant should receive one-third of the amount allowed by the Government to the son—then the verdict would be just.

The court next referred to the exemption against the claims of creditors then contained in Section 28 War Risk Insurance Act—now Section 454a, Title 38, U. S .C., and said (p. 564):

> This right of exemption was not asserted in the state court by the guardian who had no other property in the boy's estate; the attention of the probate judge apparently was not directed to the right of exemption; it may well be that if it had been called to his attention, he might, in view of the nature of the claim—moneys advanced for absolute necessities of life—have directed the guardian to waive it just as the soldier himself, if sane, could have waived it. If, however, defendant, Welty, with knowledge of this provision, participated in any arrangement whereby the right of exemption was to be waived without knowledge or authority of the court and for the purpose of enabling a

fund to be created from the compensation money out of which alone he was to be paid, the jury would be justified in finding therein an indirect and prohibited charge, and the later receipt of payment for services out of funds that belonged to the insane applicant.

By no subterfuge can the prohibited payments be indirectly solicited or received; and while the judgment of the state court may be binding as between the parties thereto—if in fact it be but a step in the carrying out of the subterfuge—the judgment rendered therein affords no defense in this case.

9. The probate court has no power to waive the fee limitation.

But in the discussion quoted, the court failed to state a very significant and fundamental principle, viz, that a court, acting for a ward can waive an exemption on his behalf (statute of limitations, fee limitation statute, or exemption from claims of creditors) only when to do so is for the benefit of the ward.

Ratcliffe, Guardian v. *Davis et al.*, 20 N. W. 763

(At p. 763:)

It is not necessary to set out all of the grounds of the demurrer. One of these is to the effect that it is not within the power of the guardian to waive the homestead rights of his ward.

It is claimed by her guardian that because she is incapable of making her wishes known, that his preference shall be substi-

tuted for hers, and that he can waive the statutory provisions. We do not think he has any power to do so, because, as it appears to us, the right is a personal one, and if not exercised for any reason, even though it be her incapacity to do so, no other person can act in that behalf in her stead.

It does not even appear from the averments of the petition that it would be to her interest, or the interest of her children, that the homestead should be waived.

Estes v. *Browning*, 60 Am. Dec. 238

(At p. 241:)

As a matter of policy, then, and as one very beneficial to estates, administrators are required to set up the statute in cases to which it applies. But this rule has no force in cases where its application would be detrimental, perhaps ruinous, to the estate.

To the same effect is *King* v. *Cassidy*, 36 Tex. 531. Indeed the court must recognize and refuse to waive the exemption or limitation, contrary to the expressed wishes of the ward, if not for the best interests of the ward.

Alling v. *Alling*, 27 Atl. 655 (52 N. J. Eq. 92)

(At p. 656:)

At the death of the husband, the widow and her infant child were, substantially, without means, and the mother was obliged to work to earn a living for both. * * * Her demand against the daughter for

her support, education, and maintenance amounts to over $12,000, or four-fifths of the child's fortune; and yet the daughter, an intelligent young lady, frankly declared on the stand that she wished her mother to be paid in full. It is hardly necessary to say that this court cannot act upon such consent, but must defend the daughter, even against her own mother's claim, examine the demand, and see if it is lawful and proper to be countenanced and enforced by this court.

* * * * *

The statute of limitations is binding on this court, as well as on the courts of law; and wherever a pecuniary demand will be barred at law it will be barred here, unless there is some circumstance in the case which renders it inequitable for the party entitled to its benefit to set it up. We have seen that this is a simple pecuniary demand, founded on a quantum meruit, and I am unable to find in the case any circumstances which renders it inequitable for this defendant to set up the bar of the statute against her mother. *She is clearly entitled to the benefit of the plea, and it is the duty of this court, as her guardian, to plead it for her.* When she attains 21 years of age, she can do what she pleases with her money, but this court cannot permit her to give it away, even to her own mother. [Italics supplied.]

The public policy established for this class of cases is in harmony with that of the State of New

York—and other states—with respect to attorney fees in *Workmen's Compensation* Cases, for example (Sec. 24, Workman's Compensation Law, New York).

In re Fisch, 177 N. Y. S. 338

One of the avowed reasons for the passage of the Workmen's Compensation Act was to insure as large a return to the injured workman in compensation for injuries incurred in the course of his employment as possible. It was realized that under the conditions theretofore prevailing the great majority of cases were taken by lawyers on contingent fees, and that from 33 to 50 per cent of the amounts recovered went to the attorneys, instead of to the workmen. Simplicity of procedure, rapidity and certainty in procuring payment, and receipt by the injured of the bulk of the award, instead of large payments therefrom for services in obtaining it, was the end looked to and accomplished by this remedial legislation.

We do think, however, it is our duty to warn the profession that we regard such conduct, or the use of any means *which the wit of man may devise,* by which a larger amount of the recovery shall go to an attorney than that fixed by the commission, as improper, unethical, and deserving of disciplinary action. We think it clear that we ought to take this stand in support of this legislation, and that hereafter we shall act

upon such offenses accordingly. [Italics supplied.]

10. Finally, the veteran contracted for the protection of the Statute, and the court must give effect to the fee limitation as a part of the veteran's contract.

The contract which the veteran made with the United States entitled him to receive his insurance undiminished by attorney fees except in consonance with the Act (Section 500). This Court has recognized that the contract of insurance consisted in the application filed by the soldier and the law and regulations pursuant to law, and that it was in all respects subject to the provisions of the law. *White* v. *United States,* 270 U. S. 175.

> The certificate of insurance provided in terms that it should be "subject in all respects to the provision of such Act (of 1917), of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the act, shall constitute the contract." These words must be taken to embrace changes in the law no less than changes in the regulations.

The veteran, even though now insane, is entitled to the protection of his contract. This contract was binding on the committee, which as an arm of the court, acts for his ward and is bound by the law applicable to the ward. The court has power to

act for the ward in some instances, but it cannot do that which the ward, if sui juris, could not legally do. And if it be argued that the veteran himself might with impunity pay his attorney an illegal fee, such liberty to ignore the law is not vouchsafed guardians or courts. As this Court significantly observed in *Hall* v. *Coppell*, 7 Wal. 542, "The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." Approved in *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261.

SUMMARY

It will, therefore, be seen that:

A. This Court has jurisdiction to review the judgment of the New York Supreme Court, Appellate Division, Second Department, in this case because of the Federal question presented, and because said court, the highest State court having jurisdiction of the cause decided the Federal question adversely to the contention of Petitioner and thereby deprived the insane veteran, represented by Petitioner, of a right granted by said Federal Statutes.

B. The United States has by statute (Sec. 500, World War Veterans' Act, Section 551, Title 38, U. S. C.) limited the fees which may be charged by any one in connection with a claim for war risk insurance.

C. This limitation was intended to, and does, apply to guardianship cases in State courts, and is

binding on said courts and on all agents and officers of the court.

D. The New York court, in deciding this case to the contrary, erred.

E. The specific point raised in this case has not been decided by this Court; and the statute in this respect should be construed by this Court.

F. The case is one of importance and public concern. It involves the question whether a law of the United States, intended for the protection of all veterans, may be, in effect, narrowed in its application, or abridged by judicial decision, as to deny an insane veteran that protection. It challenges the constitutional power of Congress to provide for the common defense, as to whether in the exercise of such power it may adequately protect veterans, or their beneficiaries and dependents, in the benefits provided for them by a grateful government. It involves the question whether an insane veteran, supposedly under the protection of the probate court, may be denied that protection not only promised him by the Government he served, but for Court should be reversed.
which he contracted and paid.

G. Under what is believed the proper construction of the statute, the judgment of the New York

CONCLUSION

It is respectfully submitted that, for the reasons stated, and upon the authorities cited herein, the judgment of the Supreme Court, Appellate Divi-

sion, Second Department, State of New York, should be reviewed by this Court by bringing before it the record on Writ of Certiorari, that Petitioner should be heard thereon, to the end that there may be vouchsafed to the insane veteran that right granted by the Federal Law, the right not to have his insurance benefits or his estate depleted by an attorney fee in excess of that fixed by said law and his insurance contract thereunder.

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In the Supreme Court of the United States

OCTOBER TERM 1938

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, incompetent, for an order authorizing him to pay a fee to counsel for legal services rendered the estate

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No. 24

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, UNITED STATES VETERANS' ADMINISTRATION, PETITIONER

v.

JAMES J. LOWREY, COMMITTEE OF THE PERSON AND ESTATE OF WILLIAM GARMES, AN INCOMPETENT PERSON, RESPONDENT

BRIEF OF PETITIONER

STATEMENT OF THE CASE

The question presented herein is whether the applicable statute, Section 500, World War Veterans' Act (Sec. 551, Title 38, U. S. C.), was construed by this Honorable Court in the case of *Hines vs. Stein*, 298 U. S. 94, 80 L. E. 1063, or is governed thereby; and, if not, whether the judgment of the New York

Court be not in contravention of the terms of said statute.

The question arose under the following factual situation: (The extensive and detailed statement of facts and action in the State Courts is contained in pp. 3–10 of the Petition for Certiorari, No. 945, October Term, 1937.)

James J. Lowrey, half-brother of the veteran, and committee of his person and estate under an appointment dated March 23, 1921, on or about April 21, 1934, retained his regular attorney James J. Richman to file and prosecute a claim for the veteran's war risk insurance (R–6, R–55, R–70). A purported contract, stated in letter of said date (R–70): "In the event you are successful, the court will fix your fee. In the event you are unsuccessful, you are to receive no fee."

The claim was immediately filed and denied because of Section 17, Public No. 2, 73d Congress (R. 12–13) but was reconsidered and allowed after this court in the *Lynch and Wilner cases,* 292 U. S. 571, held said section void (R. 23–24).

The attorney, after employing a representative of a Service Organization (R–42) was afforded the courtesy of a hearing before the Insurance Claims Counsel (R–37–41). He was paid his expenses (R–29) but attempted to secure an attorney fee of $3,000. The first petition filed was for extraordinary compensation for the committee in that amount, but after the decision of this court in the

Stein case, supra, said petition was dismissed by the attorney (R. 38, 68, 69) and a petition for attorney fees filed (R. 8–11), the attorney believing, under said decision, he had a right to receive such fee direct (R. 69). (The back-ground for this procedure may be apparent from the prior decision, *In re Lowrey (Garmes' Estate)*, 287 N. Y. S. 52. The committee, through his attorney Richman, had asked for 5% commission on this same insurance—and other payments received from March 24, 1920 to March 24, 1935—and for extra compensation by reason of alleged unusual services; but the Supreme Court Special Term denied commission for prior accounting periods, and extra compensation except upon a judicial settlement or on application alleging unusual services and after notice and hearing.)

The Administrator of Veterans' Affairs, through his authorized attorney, in accord with Section 450, Title 38, U. S. C., and as authorized by Section 1384–t, Civil Practice Act, New York, objected on the ground that any fee in excess of $10 is prohibited by Section 500, and that the fee claimed was otherwise unreasonable. The Supreme Court, Second Department, allowed a fee of $1,500 (R. 47), which was affirmed by the Appellate Division (R. 81, 300 N. Y. S. 603) and appeal was denied (R. 80, 300 N. Y. S. 1344). This Court granted certiorari (R.–83): 82 L. Ed. (Adv.) 1041.

The sole question is whether the State Court had power to grant a fee in excess of $10, the attorney's expenses having been paid (R. 29, 61) and there having been no suit filed in the Federal Court (R. 65).

The decision of the New York Courts (no opinion rendered, 300 N. Y. S. 603, ibid 1344), allowing a fee in excess of that provided and limited by Section 500, evidently was based upon the theory advanced by the attorney (R. 43) that the decision in the *Stein case* construed Section 500 and is to the effect that the Congress had not limited, and cannot limit, the discretion or jurisdiction of a State Court to allow an attorney fee in the case of an insane veteran under guardianship, inasmuch as the New York Courts had previously held, in line with other State Appellate Courts, that said statute limits the power of the State Courts in such cases. In re Shinberg, 263 N. Y. S. 354.

ASSIGNMENT OF ERROR

The Supreme Court, Appellate Division, Second Department, State of New York, erred in that—

1. It affirmed the order of the Supreme Court, "affirming the report of an official referee awarding to James J. Richman, an attorney, the sum of $1,500 for legal services rendered to an incompetent's estate in securing payment of war risk insurance," in that—

Said order is contrary to the specific provisions of section 500, World War Veterans' Act (Sec. 551, Title 38, U. S. C.).

NOTE.—The other question argued in the State Court, i. e., the reasonableness of the fee dehors the statute, is not subject to review by this Court, and will therefore be discussed only incidentally as it may illustrate the recognized need upon which the applicable legislation was based, its purpose, and the propriety and validity thereof.

STATUTE AND AUTHORITIES

Section 500, Title V, of the World War Veterans' Act, 1924 (Sec. 551, Title 38, U. S. C.), is as follows:

> Except in the event of legal proceedings under Section 19 of Title I of this Act, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and the Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Titles II, III, and IV of this Act, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed $10 in any one case: PROVIDED, HOWEVER, That wherever a judgment or decree shall be rendered in an action brought, pursuant to section 19 of Title I of this Act the court, as a part of its

judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered, and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid. Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment."

The statute quoted, supra (Section 500, World War Veterans' Act), is controlling upon attorneys and guardians of insane veterans; and therefore upon State Courts having jurisdiction of such guardianships. *In re Shinberg,* 263 N. Y. S. 304; *In re Minor,* 145 So. 507; *Hines* v. *McCoy,* 159 So. 306.

The *Stein case,* supra, is not controlling. *In re Copsey,* 60 Pac. (2d) 121. (But see later decision in same case, 76 Pac. (2d) 691, indicating judicial uncertainty on the question.)

Any contract contrary to the provisions of said Section 500 is illegal, and hence void. *Conlon* v. *Adamski,* 77 Fed. (2d) 397. The contention of re-

spondent that the Congress may not limit an attorney fee in a matter pending in a State Court is contrary to the decision of this Honorable Court in *Capital Trust Co.* v. *Calhoun,* 250 U. S. 208, and *Ball* v. *Halsell,* 161 U. S. 72.

The Congress may, indirectly, restrict effective action by State Courts through legislation on a subject within its constitutional power, and may prohibit, or render unenforceable, contracts contrary to legislation within such constitutional power. *Gold Clause Cases,* 294 U. S. 240; *Gibbons* v. *Ogden,* 9 Wheat. 1, 22 Law Ed. 207. In enacting said statute (Section 500, World War Veterans' Act) the Congress acted within such power. *Margolin* v. *U. S.,* 269 U. S. 93.

The intent of the statute, i. e., to be all inclusive and to operate on all alike, if not clear from the language used by the Congress, may be gleaned from the Legislative History. *Margolin* v. *U. S.,* 269 U. S. 93; *U. S.* v. *Carolene Products Company,* 82 L. Ed. (Adv.) 810–815.

The debate on Section 13, War Risk Insurance Act (now Section 500) (Congressional Record, Volume 56, Part 6, pp. 5220–26, April 17, 1918) is quoted in part in the record herein (R. 48–51).

While this court has intimated, in *Hines* v. *Stein,* a view that there may be no necessity for limiting fees to be allowed by courts, the Congress may determine questions of fact and policy, as a basis for legislation, and such decision is final. *Gold Clause cases, supra; Ball* v. *Halsell, supra.*

SUMMARY OF ARGUMENT

1. In enacting Section 500, the Congress of the United States limited all fees for services permitted thereby; and evinced an intention that such limitation should be controlling as to all fees, whether in a State or Federal Court, and on all persons whether dealing with sane or insane veterans.

2. While the Congress may not directly qualify the power or procedure of a State Court, it may, and frequently does so indirectly, that is, by legislation upon a particular subject.

3. When the Congress has validly legislated on a subject, the law, as the supreme law of the land, *McCulloch* v. *Md.*, 4 Wheat. 316, is applicable to all, and the judgments of Federal and State Courts must be in conformity thereto.

4. The necessity for the policy, and the factual basis for the legislation, is for the Congress to determine; and its intention expressed in legislative act, if directed to a constitutional end, is controlling.

5. The legislative history confirms the apparent meaning of the act and shows the intent of Congress to limit fees allowable for services specified therein, rendered any veteran—sane or insane.

6. Section 500 is therefore controlling as to fees allowable by State Courts for services stated.

7. State Courts of appellate jurisdiction have held heretofore that there is no power to allow a fee contrary to Section 500.

8. The decision of this Court in *Hines* v. *Stein* did not construe said Section 500 and does not govern the application thereof; but the case is controlled by the decision in *Ball* v. *Halsell* and *Capital Trust Company* v. *Calhoun*, supra.

9. The contract, if construed contrary to Section 500, is clearly illegal and void.

10. Section 500 establishes a general fee limitation in favor of an insane veteran which the court has no power to waive.

11. The theory of, and reasons for, the limitation of attorney fees in insurance and compensation cases are identical with those underlying the New York statute limiting such fees in Workmen's Compensation cases.

12. Finally, the veteran contracted for the protection of the Statute, and the court must give effect to the fee limitation as a part of the veteran's contract.

ARGUMENT

Upon the above assignment of error the following argument is respectfully submitted.

1. In enacting Section 500 the Congress of the United States limited all fees for services permitted thereby; and evinced an intention that such limitation should be controlling as to all fees, whether in a State or Federal Court, and on all persons whether dealing with sane or insane veterans.

The language of the Act, in pertinent part, is—

> Except in the event of legal proceedings under Section 19 * * * no * * * attorney * * * shall be recognized in the presentation and adjudication of claims * * * and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed $10 in any one case, * * *. Any person who shall directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, * * *.

It will be observed that the section includes (1) Fees in a Federal Court in a suit for insurance, (2) all other fees in connection with claims under the Act. As to (1) the Section, read in conjunction with Section 19 (Sec. 445, Title 38, U. S. C.), confers jurisdiction on the Federal Courts but limits the exercise thereof; as to (2) it provides a universal limitation without any exception.

Can this language, enacted for the protection of all veterans and claimants for benefits, and by its clear terms made applicable to all persons in all claims under the Act, be so construed as to deprive an insane veteran of such protection and to make legal, because approved by a probate court, an act declared a misdemeanor by the law? Can this Act,

which is wholly beneficial legislation designed for the welfare of veterans, be so narrowly construed against insane veterans if susceptible of a construction protecting their rights? This question, it is believed, has not been passed on by this Court, although the above quoted language was construed in

Margolin v. *United States*, 269 U. S. 93

In that case the attorney Margolin had been convicted in the Federal District Court for a violation of the penal provisions of said Act. This was affirmed by the Circuit Court of Appeals (2nd Circuit) that court saying (3 Fed. (2d), p. 602):

> One Yetta Cohen retained the defendant to press, and secure the allowance of her claim as beneficiary under a policy taken out by Joseph Freeman, her nephew, who died while enlisted in the United States Army. He had some correspondence with the Veterans' Bureau and made one trip to Washington to examine the records and interview the officials. It may be assumed that his services were of substantial service in procuring an allowance of Yetta Cohen's claim, and under any appraisal were worth many times the sum of $3. For them he demanded $2,000 and received $1,500.
>
> In his negotiations with the Bureau he must have been recognized as an attorney in the presentation of her claim, or his services could effect nothing. If he was so recognized, it was in the face of the statute, and

> he can recover nothing for services which he is forbidden to render. The act established a system designed to be self-executing. It makes no difference how well or ill it works. With obvious jealousy of the mediation of agents or attorneys, who might fleece the beneficiaries, it excluded them from any share in its operation, except to draw up the simple papers. The system must get along without their help, and if the beneficiaries suffer more than they would if they could employ attorneys with the risk of extortion, *courts may not correct the blunder.* [Italics supplied.]

This Court, affirming the decision of the Circuit Court of Appeals, supra, after reviewing the legislative history of the statute, said:

> We find no reason which would justify disregard of the plain language of the section under consideration. It declares that any person who receives a fee or compensation in respect of a claim under the Act except as therein provided shall be deemed guilty of a misdemeanor. The only compensation which it permits a claim agent or attorney to receive where no legal proceeding has been commenced is three dollars for assistance in preparation and execution of necessary papers. And the history of the enactment indicates plainly enough that Congress did not fail to choose apt language to express its purpose.
>
> The validity of Section 13 construed as above indicated, we think, is not open to serious doubt.

It would seem that our inquiry should end here, the decision last above cited, construing as it did the statute applicable to the facts in the instant case, seeming to say that under no circumstances may a fee contrary thereto be received. But the basis of the State Court's decision seems to be that, applying the theory of the decision of this Court in the case of *Hines* v. *Stein,* 298 U. S. 94, if Margolin had procured his $1,500 fee to be approved by a probate court in a guardianship proceeding it would not have been a violation of the statute. In effect that Section 500 constitutes no limitation on a fee allowable by a State Court.

Aside from the fact that Section 500 was not involved in the *Stein case,* is such decision authority for the proposition that a State probate court has power to allow a fee contrary to the provisions of said statute?

This Court said in that case (298 U. S. at p. 97):

> Petitioner submits that Congress, proceeding within its delegated power, directly, or through authorized executive action, has prescribed permissible fees for services such as those rendered by Sherrard, and directed how they may be paid. Also has inhibited payment of other or different sum in any manner.
>
> We need not consider the extent of Congressional power in this regard, since we are of opinion that, properly construed, the provisions relied upon do not apply where

payments like the one here involved are directed by a state court having jurisdiction over the guardian of an incompetent veteran.

The petition for certiorari asserts that the objections to respondent's application to the Court of Common Pleas were based upon the President's Order of March 31, 1933 (Veterans' Regulation No. 10), permitted by Sections 4 and 7 of the Act of March 20, 1933, c. 3, 48 Stat. 9; "Instructions" promulgated by the Administrator under authority of that Order; and Sections 111, 114, and 115, Title 38, U. S. C. A.

Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries *or* to sanction *the promulgation of rules to that end by executive officers or bureaus.*

The broad purpose of regulations in respect of fees of those concerned with Pension matters is to protect the United States and beneficiaries against extortion, imposition, or fraud. *Calhoun* v. *Massie,* 253 U. S. 170, 173. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with Pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought. [Italics supplied.]

If by this decision it were meant that the Congress cannot limit or affect the action or judgment of a probate (state) court, it would be clear that the answer to the above question would be in the

affirmative. That such was not the meaning intended is believed apparent, not only from the language used by the court, but by reason of a long line of decisions holding that the Congress, in enacting legislation, within its constitutional power, on a specific subject, affects or controls the exercise of jurisdiction by State Courts on the subject of such Federal law. *Mondou* v. *Ry. Co.*, 223, U. S. 1, and cases cited.

2. While the Congress may not directly qualify the power or procedure of a State Court, it may, and frequently does so indirectly, that is, by legislation upon a particular subject.

McCulloch v. *Maryland*, 4 Wheat. 316

This Court, speaking through Chief Justice Marshall, said at page 405:

> If any one proposition could command the universal assent of mankind, we might expect it would be this, that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all. * * *

and at page 426:

> This great principle is that the Constitution and the laws made in pursuance thereof are supreme, that they control the Constitution and laws of the respective states, and cannot be controlled by them.

Mondou v. *New York, New Haven, and Hartford Railway Company*, 223 U. S. 1

That was a case involving rights arising under the Federal Employees' Liability Act, the State Courts having declined to take cognizance of certain provisions thereof as being contrary to their procedure. This Court said (p. 55):

> We come next to consider whether rights arising under the congressional act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion * * *.

And at page 56:

> Because of some general observations in the opinion of the supreme court of errors, and to the end that the remaining ground of decision advanced therein may be more accurately understood, we deem it well to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws, is appropriate to the occasion and is invoked in conformity with those laws, *to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure.*

The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution adopted that act, *it spoke for all the people and all the States, and thereby established a policy for all.* That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state. As was said by this Court in *Claflin* v. *Houseman,* 93 U. S. 130, 136, 137; 23 L. E. 833, 838, 839:

"The laws of the United States are laws in the several states, *and just as much binding on the citizens and courts thereof as the state laws are.* The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. * * * If an act of Congress gives a penalty (meaning civil and remedial) to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief—because *it is subject also to the*

> ***laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws.*** The two together form one system of jurisprudence, which constitutes the laws of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. * * * It is true, the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by the Chief Justice Taney, in the case of *Albeman* v. *Booth* (21 How. 506, 16 L. E. 169); and hence the state courts have no power to revise the action of the Federal Courts, nor the Federal the State, except where the Federal Constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied."

(At p. 58):

> "We conclude that rights arising under the act in question may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion." [Italics supplied.]

Further, this Court said in *Norman* v. *Ry. Co.*, 294 U. S. 240, at p. 309:

> The principle is not limited to the incidental effect of the exercise by the Congress of its constitutional authority. There is no constitutional ground for denying to the Congress the power expressly to prohibit and invalidate contracts although previously made, and valid when made, when they interfere with the carrying out of the policy it is free to adopt.

3. When the Congress has validly legislated on a subject, the law, as the supreme law of the land, *McCulloch* v. *Maryland,* supra, is applicable to all and the judgments of Federal and State courts must be in conformity thereto.

Ball v. *Halsell,* 161 U. S. 72.

That was an action in a Federal Court on a written contract between one Halsell and an attorney, Ball, whereby the latter was to prosecute a claim, in favor of the former, against the United States, based upon alleged Indian depredations; and if successful to receive one-half of all moneys received. The claim was against the executrix of Halsell's estate. In the Indian Claims Act, March 3, 1891, Chapter 358, the Congress *prohibited any fee to an attorney other than as allowed by the Court of claims* and then not to exceed 20% of the amount recovered, and made void any contracts to the contrary.

Mr. Justice Gray delivering the opinion of the Court said (p. 80):

> By several decisions of this court, indeed, beginning at December term, 1853, contracts for contingent fees, by which attorneys employed to prosecute claims against the United States were to be allowed a proportion of the amount recovered in case of success, and nothing in case of failure, were held to be lawful and valid.
>
> Congress has evidently considered that, in some cases at least, to permit contracts to be made for the payment to attorneys, by way of contingent fee, of a large proportion of the amount to be recovered, is in danger of leading to extortion and oppression.

(At p. 83):

> In view of previous experience, this last provision was a wise, reasonable, and just provision for the protection of suitors; and it was clearly within the constitutional power of Congress.

(At p. 85):

> For the reasons above stated, Ball cannot maintain this action upon the contract between him and Halsell; and he does not sue and could not recover, upon a quantum meruit.

Capital Trust Company v. *Calhoun*, 250 U. S. 208

That was a proceeding in equity against an executor for an accounting in a probate (circuit) court of Kentucky wherein the attorney, Calhoun, inter-

vened and secured a decree ordering the executor of the estate of one Arnold to pay an attorney fee based upon a contract to prosecute a claim against the United States for a fee of 50% of any amount collected. The Court of Appeals of Kentucky affirmed the decree, 177 Ky. 518, 197 So. 944, and a writ of error to this court was sued out on the ground that the Congress had validly limited the attorney's fee to not to exceed 20% of the amount recovered. In reversing the decree of the State Court this Court, speaking through Mr. Justice McKenna, said (p. 216):

> But the judgment is construed by the parties as having more specific operation, construed as subjecting the money received from the government to the payment of the balance of Calhoun's fee; doubtless because the estate has no other property. On that account it is attacked by the Trust Company and defended by Calhoun. The controversy thus presented is discussed by counsel in two propositions: (1) The validity of the contract independently of the limitation imposed by Congress upon the appropriated money; (2) the power of Congress to impose the limitation as to that money. The latter we regard as the main and determining proposition; the other may be conceded, certainly so far as fixing the amount of compensation for Calhoun's services.

(At p. 217):

> We, however, need not dwell upon the distinctions (their soundness may be dis-

puted), nor upon the contentions based upon them, because, as we have said, we consider the other proposition, that is, the power of Congress over the appropriated money and the limitation of payment out it to an agent or attorney to 20 per cent of the claim, to be the decisive one.

In its discussion counsel for Calhoun have gone far afield and have invoked many propositions of broad generality, have even adduced as impliedly against the power, if we understand counsel, the constitution of the court of claims and its jurisdiction, as weight in the same direction.

(At p. 218):

In a general sense there is force and much appeal in the contentions, but we think they carry us into considerations beyond our cognizance. Liberty in any of its exertions and its protection by the Constitution are of concern. The right to bind by contract and require performance of the contract are examples of that liberty and that protection, and they might have resistless force against any interfering or impairing legislation if the contest in the case was simply one between Calhoun and the Arnold estate. But there are other elements to be considered, *there is the element of the condition Congress imposed on the subject-matter of the controversy, regarded as a condition of its grant.* [Italics supplied.]

(At p. 219):

> The contention (i. e., that the legislation was beyond the constitutional power of Congress) has no legal basis, and it may be said it has no equitable one. Neither the justice nor the policy of what sovereignty may do or omit to do can be judged from partial views or particular instances. It is easy to conceive what difficulties beset and what circumstances had to be considered in legislating upon such claims. Definite dispositions were matters of reflection, and, it may be, experience, imposition was to be protected against as well as just claims provided for; and, considering claimants and their attorneys in the circumstances, it may have seemed to Congress that the limitation imposed was fully justified—that 20 per cent of the amounts appropriated would be a proper adjustment between them. We are not concerned, however, to accuse or defend. Whatever might have been the moving considerations, the power exercised must be sustained. [Parenthesis ours.]

And in *Calhoun* v. *Massie*, 253 U. S. 170, this Court held that the limitation as to the fee is not confined to the proceeds of the Congressional grant, i. e., it is a general limitation.

4. The necessity for the policy, and the factual basis for the legislation, is for the Congress to determine; and its intention expressed in legislative act, if directed to a constitutional end, is controlling.

When the Congress has exercised its constitutional prerogative in legislating on a *subject*, for example bankruptcy, currency, commerce, or attorney fees in claims against the Government, State laws, statutory or common, and State Court jurisdiction and procedure are affected and controlled thereby as this court has held in the cases cited and numerous others. The determination of the *necessity* for such legislation is a legislative, not a judicial, function.

Norman v. *B. & O. Railway Co.*, 294 U. S. 240

In that case, and in the other *Gold Clause cases* decided contemporaneously, the opposition was directed to the power of Congress with particular respect to the due process and impairment of contract provisions of the Constitution. In sustaining the legislative power this Court, speaking through Mr. Chief Justice Hughes, said (p. 307):

> Here, the Congress has enacted an express interdiction. The argument against it does not rest upon the mere fact that the legislation may cause hardship, or loss. * * * And the contestants urge that the Congress is seeking not to regulate the currency, but to regulate contracts, and thus has stepped beyond the power conferred.
>
> This argument is in the teeth of another established principle. Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may

> create rights of property, but when contracts deal with a subject matter which lies within the control of the Congress they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

(At p. 311):

> That point is whether the gold clauses do constitute an actual interference with the monetary policy of the Congress in the light of its broad power to determine that policy. Whether they may be deemed to be such an interference depends upon an appraisement of economic conditions and upon determinations of questions of fact. *With respect to those conditions and determinations, the Congress is entitled to its own judgment.* We may inquire whether its action is arbitrary or capricious, that is, whether it has reasonable relation to a legitimate end. *If it is an appropriate means to such an end, the decision of the Congress as to the degree of the necessity for the adoption of that means, is final.* [Italics supplied.]

5. The legislative history confirms the apparent meaning of the act and shows the intent of Congress to limit fees allowable for services specified therein, rendered any veteran—sane or insane.

Since legislation on a subject, or as to persons, is controlling as to power of courts, and since the language of Section 500 seems sufficiently broad to include all persons and all courts, the argument

that a probate court has jurisdiction to allow a fee contrary thereto must be based upon the proposition that the Congress *did not intend* to limit the power of State Courts as to fees that may be allowed in preparing and filing claims for war risk insurance (or for other benefits included in Section 500).

Did the Congress consider that there was necessity for limiting fees to be allowed in such cases by State Courts, and if so did it evidence its intent by apt language in the legislative enactment (*Margolin* v. *U. S.*, supra)?

This court took judicial notice, in the *Margolin case* of the legislative history of Section 13, War Risk Insurance Act (now Section 500). Further light is shed on the question by the debates in the House of Representatives on this section reported in the Congressional Record, Volume 56, Part 6, pp. 5220–26, April 17, 1918, which are contained in part in the record in this case (R. 48–51). Portions of the debates believed pertinent to this inquiry are as follows:

> Mr. RAYBURN. The only reason on earth for the introduction and report of this bill and the asking for its consideration is that since the passage of the war risk insurance act, like what happened under the pension act to some extent, organizations of lawyers have been formed from one end of this country to the other, so-called lawyers, who have been preying upon the ignorance of the

people, who are the beneficiaries of the act for insurance, compensation, and allotments.

Mr. MOORE of Pennsylvania. That ought to be stopped.

Mr. RAYBURN. That is exactly what we are trying to stop, and that is the only thing this bill seeks to do.

* * * * * *

Mr. TREADWAY. The reason for the introduction of this measure is very plain. I desire to call attention to a sentence in section 13 of the war risk insurance act approved October 6, 1917, which reads as follows:

"The director shall adopt reasonable and proper rules to govern the procedure of the divisions to regulate the matter of compensation, if any, but in no case to exceed 10 percent, to be paid to claim agents and attorneys for services in connection with any of the matters provided for in Articles 2, 3, and 4."

Now Articles 2, 3 and 4, are the allowance, compensation, and war-risk insurance, so that you see whatever was done under the authority of a claim agent entitles that agent to receive 10 percent of the benefits derived by the beneficiary from the Government. In other words, take, as an illustration, a $10,000 war-risk insurance policy. Such a policy would not be paid in a lump sum of $10,000, but would cover a period of 20 years, or 240 months.

Now, then, during the entire life of that policy the claim agent who has presented the

claim to the War Risk Bureau can demand the 10-percent commission for those services.

Undoubtedly, that was a mistake in the framing of the bill. The bill never was so intended. The department did not intend, the gentlemen who offered the war-risk insurance bill did not intend, nor did the Committee on Interstate and Foreign Commerce intend that any such opportunity should be given to the claim agent.

* * * * * *

I hold in my hand a set of papers. * * * This is the form in which the claim agents sent out the papers, giving them power of attorney and agreement as to attorney's fees, and a form of printed letter of which I want to read one sentence: * * *

"Of course, you understand that in a claim of any sort against the Government, no officer or agent of the Government can render the claimant the aid and counsel an attorney can * * *."

And so forth. In other words, this claim-agent concern here says that it can do better service for the beneficiaries under the war-risk insurance act than can any officer or agent of the Government. Was there ever a more deceiving communication put in the hands of friends and bereaved relatives than such a letter as that?"

Unless there is still some joker we have not discovered [italics supplied], enactment of this bill will absolutely prevent applications being made by claim agents in behalf

of beneficiaries under the act who would prevent them from obtaining all that is justly their due.

There is no need for the intercession of agents or attorneys in these claims, as already stated.

* * * * *

Mr. JUUL. I should like to ask the gentlemen if the penalty clause in this bill may not be misunderstood, and should it not provide an exception in favor of people who legally represent claimants when there is a dispute between the Government and the claimant?

Mr. TREADWAY. That must come through court action. There could be no question of any discrepancy in that feature.

Mr. JUUL. But, if the gentlemen will pardon me, in line 22 you provide a penalty against anyone who shall negotiate with anybody——

Mr. TREADWAY. It is intended that it should.

Mr. JUUL. I understand; but there are cases where attorneys are permitted by the bill, and you do not except those attorneys from the penalty.

Mr. TREADWAY. May I call the gentleman's attention to the fact that there are two places where attorneys or claim agents are recognized? *One is in the preparation of the papers and the execution of necessary papers, where not to exceed $3 may be charged. That is simply a clerical service.*

Then, you will see the bill also recognizes attorneys in connection with a suit.

Mr. JUUL. Yes.

Mr. TREADWAY. *There is no other place where the claim agent can legally perform services, and it is not intended that there should be.* [Italics supplied.]

Mr. JUUL. My question to you is whether or not you are providing a penalty for the attorney who properly represents the claimants before the Government, where there is a dispute as to the appointment and who the claimants are.

Mr. TREADWAY. If the gentleman will read lines 10 to 21, I think he will get the information; but I would be glad to take it up with the gentleman any time.

* * * * *

Mr. JUUL. * * * This is an important matter. Here is the situation, that time may run against the claimants. The claimants can not negotiate with the attorney. Suppose the claimant is tired out by departmental delay. He goes to an attorney and seeks to get redress. The attorney is absolutely prohibited from negotiating with him for any fee.

Mr. SNOOK. In case of allotment or compensation the case will be entirely taken care of by the Government, and there will be no reason for an attorney at all, because the Government will investigate the question and it will be decided without the need of an attorney. Now, when it comes to the question of insurance, as soon as there is a dis-

agreement he is allowed to employ an attorney, and the court is authorized to allow an attorney fee up to 10 percent.

Mr. JUUL. Suppose there is a disagreement as to who is the legal claimant in the case; may the one who is decided by the department not to be the legal claimant go to his attorney and say, "I, and not the other man, am the legal claimant," and if he does, is the attorney to be subjected to a penalty because he negotiates?

Mr. SNOOK. No; not if he negotiates, but if he charges a fee not authorized by the law. * * *

Mr. LINTHICUM. Is not the gentleman wrong when he says that it provides a 10 percent fee? Does not the law provide not exceeding 10 percent?

Mr. GREEN of Iowa. If the gentleman has practiced law, as I presume he has, I will ask if he ever knew of a court cutting down those fees?

Mr. LOBECK. And the gentleman has had experience as a judge, too?

Mr. GREEN of Iowa. The gentleman will excuse me from answering that. I am not speaking from the standpoint of a judge; if I was, I would say the attorney always claims to have earned the fee.

Mr. DEWALT. * * * This act provides:

"And provided further, That no claim agent or attorney shall be recognized in the presensation or adjudication of claims under articles 2, 3, and 4 of the original act."

> Now, what are articles 2, 3, and 4 of the original act? Article 2 in the original act is in reference to allotment of family allowances. Article 3 is as to compensation for death or disability. Article 4 is as to insurance. So the proposed legislation succintly sets forth that no claim agent or attorney shall be recognized in the presentation or adjudication of claims in regard to compensation, in regard to insurance, or in regard to allotment, except as provided in this act, namely, that there shall be an allowance of $3 for the preparation of papers in the presentation of the claim, and that no other allowance shall be made. That shall be the maximum.

The bill was passed without amendment, although the $3 limitation was, in section 500 (Act June 7, 1924, as amended March 4, 1925), raised to $10. Numerous attempts have been made to repeal or modify this section, but the Congress has ever refused to do so, and as late as June 29, 1936 (Pub., No. 844, 74th Congress, Sec. 200–203), affirmed the principle of fee limitation therein contained. If the language of the statute be not clear, certainly the legislative history, including the debate quoted, leaves no doubt that the intent was to prohibit a fee in excess of $10 under any circumstances, except in a successful suit on the insurance contract.

It seems apparent that by this legislation the Congress intended to protect all veterans; but it has evidenced further purpose to afford the greatest

possible protection to insane veterans, with special emphasis on illegal or excessive attorney fees allowed by probate courts in guardianship cases. The real purpose of the Congress in placing upon the Administrator the duty and responsibility of appearing in probate courts to protest excessive fees is shown likewise by the reports and debates on that part of a Bill which is now Section 450, Title 38, U. S. C. (Section 21, World War Veterans' Act, as amended by the Act of August 12, 1935, Public, No. 262, 74th Congress). This is the law whereunder the Administrator of Veterans' Affairs was required to appear in the State Court in the instant case and object to the fee as illegal or "in excess of that allowed by law."

(Congressional Record, June 26, 1926, Vol. 67, No. 166, P. 12079):

> Mr. ROBINSON of Arkansas. My information is that the retention of this House language will give the Veterans' Bureau a standing and enable it to protect the veterans against the practices which are implied in the charges against * * *.
>
> Mr. REED of Pennsylvania. * * * Quite seriously, we are in full agreement with what the Senator has said about the impropriety, but we did not think it was right to have the Veterans' Bureau usurp the authority of the State Courts which appoint these guardians. What we have done has been to adopt the House language, which the Senators will find on the following page of

the bill, which gives the director authority to go into these courts of appointment whenever he finds anything to take exception to in the conduct of a guardian, gives him standing to interplead, as it were, and ask the removal or the surcharge of the guardian.

Mr. DILL. The Senator says we do not want to interfere with these courts, but the Senator knows that the Congress cannot reach the courts but the Congress can reach the director if he does not protect these people in his charge.

* * * * *

Mr. DILL. The history of the matter shows that the courts did not protect them, and therefore Congress ought to, by this legislation.

Mr. REED of Pennsylvania. In this legislation we give the director authority to go into any State Court and we provide for the payment of the necessary expenses and fees in doing so. We thought—perhaps the Senate will disagree with us—that that was as far as we ought to go in the recognition of the independence of the several States in the appointment of conservators and guardians.

(At p. 12082):

Mr. GEORGE. * * * There is not a shadow of doubt that the Congress appropriating money for the disabled veterans may safeguard that money; and there is not a shadow of doubt that the Director of the Veterans' Bureau may be given authority to

appoint a guardian for the ward or to withhold the payment of money to the guardian if for any reason he finds that the guardian is commercializing the infirmities and the afflictions of the ward. Congress has that power, undoubtedly, but it seemed to many members of the Committee that it was a sounder policy to recognize the validity of the appointment of a guardian by the State of Virginia or the State of Alabama or the State of Georgia or the District of Columbia and allow the director of the bureau to go into the court and bring to the attention of the court any irregularity or any misconduct upon the part of the guardian.

* * * * *

Mr. DILL. The Senator says he is a ward of the State Court. I do not care whether he is a ward one way or the other. The fact remains that these men are taken care of at the expense of the Federal Government; *and if any State Court in its action fails to protect these men, then I think Congress ought to provide that the man who is under the direction of Congress, namely the director, should protect them.*

* * * * *

The section as enacted provides in part: "Whenever it appears that any guardian * * * or other person * * * has collected or is attempting to collect fees * * * that are inequitable or are in excess of those allowed by law * * * the director (Administrator) is hereby empowered

by his duly authorized attorney to appear in the court which has appointed such fiduciary and make proper presentation of such matters to the court."

It is not reasonably to be presumed that the Congress would require the Administrator to make such representations, as to "fees * * * in excess of those allowed by law", without being convinced of the necessity for such action; that is that insane veterans need additional protection in probate courts.

6. Section 500 is therefore controlling as to fees allowable by State Courts for services stated.

It is believed that the legislative history clearly shows that the Congress was of the opinion that all veterans, sane or insane, and whether sued in court on a contract or in a guardianship proceeding, needed, and that it was the intent to afford protection against attorney fees in excess of those fixed by the Congress as proper and allowable. Further, that as to insane veterans under guardianship, and therefore under the protection of the State Courts, the Congress has—not once merely but several times, and after exhaustive investigations and hearings—determined that they need added protection. As said by this court in *Spicer* v. *Smith,* 288 U. S. 430, the Congress showed a purpose "to safeguard to beneficiaries the appropriations and payments made for their benefit * * * and evince special solicitude for the protection of veterans who by reason of mental incompetency are unable to

protect themselves." If a sane veteran, or beneficiary, is entitled to protection against excessive attorney fees (*Margolin case,* supra) why, especially in view of the expressed Congressional solicitude, should not insane veterans be entitled to the same protection?

Further, why should not the limitations as to attorney fees (Section 500) be binding upon the State Courts the same as those with respect to taxation, or exemptions from creditor claims, Section 454, Title 38, U. S. C., contained in the same original Act and carried forward in all subsequent amendments thereto?

Lawrence v. *Shaw,* 300 U. S. 245

This court held such limitations as to taxation of the funds paid a guardian of an insane veteran, and deposited by him in a bank, valid and controlling even as against the sovereign power of a State, and reversed the judgment of the Supreme Court of North Carolina which had affirmed an order of the Superior Court, the court having jurisdiction of the guardianship.

7. State Courts of Appellate jurisdiction have held heretofore that there is no power to allow a fee contrary to Section 500.

Prior to the present case no State Appellate Court has ever held that Section 500 is not absolutely controlling as to power to allow attorneys' fees in connection with the claims for benefits under

the World War Veterans' Act, as amended. The *Stein Case,* arising in the Superior Court, Allegheny County, Pennsylvania, involved the pension acts and Executive Orders, but not Section 500. *In re Stein,* 180 Atl. 577. One of the clearest expositions of the doctrine that the State probate courts are, and should be, bound by the Federal Statute is contained in a case decided in the Supreme Court, Appellate Division, First Department, New York. *In re Shinberg, Hines* v. *Schwartz,* 263 N. Y. S. 354, 238 A. D. 74.

In that case the attorney Schwartz, acting for the committee for the insane veteran, filed an action prematurely (i. e., without having secured the requisite jurisdictional disagreement, although this was not conceded), in the Federal District Court, Eastern District of New York, on the contract of insurance. Said suit was voluntarily dismissed, whereupon the claim was paid by the Veterans' Administration. The committee secured from the probate court (Supreme Court, First Department, New York) an order to pay the attorney a sum equal to 10% of the amount received. The Administrator of Veterans' Affairs filed an application pursuant to New York practice to vacate the order, which was denied, but the Appellate Court reversed the Supreme Court saying:

> The respondent contends that inasmuch as the settlement was made after the claim had been denied by the government, and after

he had instituted an action in the United States District Court, he is not bound by the $10 limitation.

All the parties connected with the litigation speak in very glowing terms of the able services rendered by the respondent in behalf of the incompetent. Mrs. Shinberg, the wife of the veteran, has submitted an affidavit in which she avers that her husband would not have received anything if it had not been for the services of the respondent, Sanford N. Schwartz.

The appellant contends, however, that it is his duty to object to the allowance made by the court, in view of the provisions of Title 38, U. S. Code Annotated, Section 551, to the effect that the payment of any claim agent or attorney for assistance in the preparation and execution of necessary papers in any application to the bureau shall not exceed $10; that wherever a decree or judgment shall be rendered in an action, the court shall determine and allow reasonable fees for the attorney not to exceed 10 percent of the amount recovered, the respondent is bound by the provisions thereof, and not having applied for a decree or judgment he becomes a creditor against the estate of the incompetent person.

We are confronted with the emphatic language of this statute, which provides that an attorney must not take more than $10 for services rendered to an incompetent person, unless a judgment or decree is entered, at

which time the court must provide in said judgment or decree for the allowance of a reasonable fee not to exceed 10 per centum of the amount recovered and to be paid. This statute was considered in *Welty* v. *United States* (C. C. A.) 2 Fed. (2d) 562, where the court held that the statute does not prevent a guardian, or other person, paying out of his own funds compensation to an attorney for his services, but that the estate of the ward should not be taxed with an additional fee unless suit is filed.

In *Purvis* v. *Walls et al.*, 184 Ark. 887, 44 S. W. (2d) 353, an attorney was indicted for taking more than the fee permitted by statute. He accepted $1,380 for securing benefits under war risk insurance, similar to those secured in this case. After a trial in the District Court he was convicted, and on appeal the conviction was affirmed. *Purvis* v. *United States* (C. C. A.) 61 Fed. (2d) 992. Judge Kenyon wrote an opinion for the Circuit Court of Appeals in which he held it to be a crime to take more than the $10 allowed by statute, unless such allowance is made as provided by law. See also *Lopez* v. *United States* (C. C. A.) 17 Fed. (2d) 462; *Margolin* v. *United States*, 269 U. S. 93, 46 S. Ct. 64, 70 L. E. 176.

In the Matter of Zadurin's Estate, 142 Misc. 24, 25, 253 N. Y. S. 652, 653, the surrogate of New York County in a similar case disallowed a claim of $1,500, stating: "This court will not affirmatively join in a violation

of the rules governing attorneys' fees in such Federal matters as the war-risk insurance. The amount involved in the assignment does exceed the allowance permitted by the Federal rule. * * * The claim in the sum of $1,500 is disallowed."

The argument is here made that suit was brought in the present instance. It must be admitted, however, that the suit was discontinued and the claim settled by the government with the committee for the incompetent.

This is not a case where a judgment or decree was entered. Although the statute does say that the $10 limitation applies where no suit has been filed, nevertheless it also provides that any allowance to be made where a suit has been filed must be made in the judgment or decree growing out of that action.

There may be cases where the enforcement of this statute will result in a hardship. Admitting that this may be such a case, nevertheless the necessity for such a statute must be apparent, especially in view of the great need of protection for people who really are wards of the court and who, in the absence of such statutory provision, would, in many cases, be preyed upon by the unscrupulous. Because it safeguards and protects the unfortunates who are wholly dependent upon the government for support, this statute should be rigidly enforced.

In the present case, the court has no power to award any portion of the war-risk insurance to the attorney for the committee

of the incompetent. The order should be reversed, and the motion granted.

Order reversed, and motion granted. Order filed. All concur.

A like conclusion was reached by the Supreme Court of Mississippi in

Hines v. *McCoy*, 159 So. (Miss.) 306

That was a guardianship case in Mississippi wherein the guardian claimed credit for attorney fees in the amount of $1,300 for securing payment of war-risk insurance, which fee was allowed by the Chancery Court having jurisdiction. On appeal by the Administrator the Supreme Court of Mississippi reversed the Chancellor's decree saying:

> The main argument in justification of the allowance of the $1,300 fee, and the chancellor's act in sustaining the demurrer to the petition of Hines, the administrator of veteran's affairs, is that the chancery court is not controlled by the federal authorities in the administration of estates, after the money has passed into the hands of the guardian, and that the federal administrator has no standing to intervene and question any act done in the administration, because he has no such interest as would warrant his intervening, and that it would be a meddling by bureaus of the federal government to allow a federal administrator to control the state courts.

We do not think this contention can be maintained. There is no effort, as we understand the proceeding here, for the federal government to undertake to control the state court, but the government seeks to see that the money allowed to war veterans through insurance is properly and economically administered. The federal government has the right to provide, as a condition of the policies and the allowances, as it has provided that not more than a given amount ($10.00) shall be allowed for procuring the money from the government for war veterans. If a suit is necessary, the federal act provides that same may be brought in a federal court, and that that court may allow a reasonable attorney's fee. There is nothing in the petition by the guardian for the allowance showing that the chancellor entered any finding that the $1,300, or any part of it, was allowed by the federal government for services rendered in procuring the insurance. On the contrary, the federal administrator shows that there was no such proceeding.

The United States has a standing in the courts of this state to assert any rights it has, or may have, of a justiciable nature.

It appears to us that, by the rules of comity, the Veterans' Administrator should be permitted to come into court and challenge any improper allowance of the money received from the government. It certainly

would not be contrary to public policy so to do. * * * * * *

The appellant, therefore, was authorized to intervene and challenge the allowance. Under the allegations of the petition of Frank T. Hines, to which the demurrer was allowed, the fee was clearly excessive, and there was no specification of items in the administrator's petition for allowance showing what the services were for, whether they were for procuring the money from the government, or whether for the filing of the two annual accounts. We think the allegations of the petition were sufficient to require an answer, and the court should hear evidence on both sides and determine the cause in the light of such hearing.

To the same effect is the decision, *In re Minor*, 145 So. 507. In that case the facts are stated by the decision:

Roy C. Minor had a policy of War Risk insurance from the Government. When J. H. Minor took out letters of guardianship he noted that a portion of the premium was in default, and he sought to pay the premium to the Government which refused to receive it. He thereupon consulted his attorney, and they agreed that the attorney would undertake to investigate the matter and take the necessary steps to procure the reinstatement of the policy or adjusted compensation, and that the attorney would be paid such compensation for his services as the court would allow. This attorney, at considerable

expense of time and money, investigated the matter fully, and established that Roy C. Minor became wholly incapacitated before the lapse of the policy. This attorney took proof and presented same to the Government which accepted the situation, and allowed to the Guardian, as adjusted compensation, the sum of $12,666.00, of which $11,000 had been paid prior to the filing of the petition.

It was established, and the Chancellor found, that the attorney's services were reasonably worth ten per cent of said amount, and that the soldier's compensation was secured through the efforts of the attorney, but the Chancellor further found that, under Section 551, United States Code, Anno. Title 38, he could not allow the fee as no suit had been filed on behalf of Roy C. Minor for the purpose of procuring this adjusted compensation, and disallowed the claim.

After quoting Section 500 the Court held:

As no suit was filed, it appears that the fee as allowed by this section, shall be $10.00, and the courts cannot allow more where there is no suit filed.

The validity of the Federal statute was upheld in the case of *Margolin* v. *United States*, 269 U. S. 93, 70 L. E. 176. In *Welty* v. *United States*, 2nd Federal Reporter (2nd) 562, it was held that the statute does not prevent a guardian, or other person, paying, out of his own funds, compensation to

an attorney for his services, but that the estate of the ward could not be taxed with an additional fee unless suit was filed.

In the case at bar, it is true that the actual expenses of the attorney largely exceeded the fee allowed by the statute, but we are without power to create authority to tax the estate of the soldier with additional fees.

That the rule stated in these decisions was not changed by this court's decision in *Hines* v. *Stein* seems to have been the view of the Supreme Court of California in its first decision in the case of

In re Copsey, 60 Pac. (2d) 121

That was a guardianship case in the Superior Court, Mendocino County, California, wherein the sister and guardian of an insane veteran employed an attorney to file a claim on his war risk insurance contract. The papers were prepared and claim filed, and paid without suit as in the instant case. The Superior Court, on the guardian's application, allowed the attorney a fee of $4,000 for such services, approximately 31% of the insurance paid. An appeal, based as in the instant case, on Section 500, was filed by the Administrator, and the attorney filed a motion to dismiss the appeal urging certain alleged defects of procedure—as well as that the Administrator was not a proper party—but principally that the matter had been disposed of by the decision of this Court in *Hines* v. *Stein.* The California Supreme Court in refusing to dismiss the appeal said (p. 123):

Respondent has directed our attention to a recent case decided by the United States Supreme Court, *Frank T. Hines* vs. *Minnie Stein,* as guardian, etc. 56 S. Ct. 699, 701, 80 L. E. 1063, decided April 27, 1936, which he claims is conclusive of the present appeal. In that case the administrator of veterans' affairs objected to an attorney's fee, which was allowed by the local court to an attorney for special services rendered by him in the guardianship matter, on the ground that the same was in excess of the amount fixed by the federal statutes and in the president's order promulgated thereunder. *Practically the same contentions made by the appellant in the present guardianship matters were made there.* The Supreme Court of the United States held in that case, that "We find nothing in any of these acts of congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them." It accordingly affirmed the order of the court of common pleas fixing and allowing said attorney's fees. But in that case the appellant admitted that the services were rendered by the attorney and that the charge was reasonable. While the appellant in his brief does not stress the point that the charge of $4,000 for extraordinary services rendered by the attorney in the Copsey guardianship matter was unreasonable, he does not expressly or by implication in any

stage of these proceedings admit its reasonableness. *This distinction between the two cases deprives the cited case of any authoritative force upon the hearing of respondent's present motion to dismiss.* Incompetent persons are made the special wards of the court, and it is the duty of the court to protect them and their property, whenever it appears from the records in any proceeding before the court, that such action is necessary or advisable. [Italics supplied.]

The Supreme Court of California in deciding the case on the merits (76 Pac. (2d) Adv. 691) held that the court could allow a fee in excess of $10, but that the $4,000 fee was unreasonable, and suggested that the fee to be allowed on remand should not exceed 10% of the insurance paid. But in its opinion that Court said (p. 693):

In view of the fact that incompetent persons are made the special wards of the court, and it is the duty of the court to protect them and their property (Guardianship of Copsey, supra), it would seem to follow as a matter of reason and logic that attorneys' fees, in excess of the schedule set out in Section 551, Title 38, United States Code, as permissible to be allowed an attorney for a competent veteran, could not be validly allowed the attorney for the guardian of an incompetent veteran. Several state courts have so held. (In re Shinberg, 263 N. Y. S. 354; In re Roy C. Minor (Miss.), 145 So. 507; Hines v. *McCoy (Miss.), 159 So. 306.)*

If the government is zealous to protect competent veterans from unreasonable expense in the collection of their claims for government aid, with how much more reason should the estates of incompetent veterans be protected from excessive charges. We are, however, squarely faced with the recent decision of the United States Supreme Court in the case of Hines v. Stein, as guardian, etc., 298 U. S. 94, decided April 27, 1936.

Although the above case deals with *compensation payments,* whereas the instant case deals with *insurance,* and although the *sections involved are different,* Sections 111, 114, and 115 of Title 38, U. S. C., being involved in the cited case, whereas Section 551 of Title 38, U. S. C., is the section which governs and controls in the instant case, *these differences do not furnish a logical basis for a distinction between the cited case and the instant case nor furnish us with a reasonable basis for holding that the case of Hines* v. *Stein, supra, is not controlling in the instant case.* We are, therefore, constrained to hold, by virtue of this recent decision of the United States Supreme Court, that the probate court in the instant case could validly allow an attorney's fee for services rendered to the guardian of an incompetent veteran in excess of the schedule set out in Section 551 of Title 38 of the United States Code. [Italics supplied.]

Of course the mere name of the benefit, whether pension, compensation, or insurance, is not the dis-

tinctive factor. Indeed, this court has held that compensation is another name for pension and that War Risk Term Insurance partakes in part of the nature of a pension. But it does not follow that the Congress saw fit to prescribe the same limitations respecting such benefits. Pensions are subject to the pension statutes; compensation and insurance to the World War Veterans' Act as amended.

The language quoted by the California Supreme Court from the Stein decision, "We find nothing in any of these Acts of Congress which definitely undertakes to put limitation upon State Courts * * *" was used by this court, it is believed, by way of discussion rather than decision, and concerned pension laws rather than Section 500. The claim in the *Stein case* was for a *pension,* not compensation (Sec. 17 of the Economy Act had repealed all laws granting compensation). The acts enumerated by this court were Pension Acts, not Section 500. It does not follow, the California Court decision to the contrary, that there is no distinction between the cases, or that the *Stein case* is controlling in the instant case, or that Section 500 must be construed to the same effect as the pension acts in the *Stein case.* To determine that question involves study of the terms of the statute, and, if at all doubtful, of the legislative history thereof. The distinction which the California Supreme Court apparently desired to make but could not see its way clear so to do, inheres not in the type of

benefit but in the terms and intent of the applicable statute. In the *Stein case,* as pointed out by this court, there was involved an Executive Order (Veterans' Regulation) purporting to extend the civil and penal provisions of certain pension statutes to claims for benefits payable under Public, No. 2, 73d Congress. (In passing, these have been replaced by Public, No. 844, 74th Congress, Act of June 29, 1936, Section 200–3.) In the instant case, there is for application legislative language, characterized by this court (*Margolin case,* supra) as clear and unambiguous—

> * * * no attorney * * * shall be recognized in the presentation or adjudication of claims * * * and *payment to any attorney * * * for such assistance as may be required in the preparation * * * of the necessary papers in any application to the bureau shall not exceed $10 in any one case* * * * (except as to a suit in the Federal Court in which event a reasonable fee not to exceed 10% of the judgment can be allowed by said court) *any person who shall directly, or indirectly, solicit, contract for, charge, or receive, or who shall attempt* * * * (to do so), *except as herein provided, shall be guilty of a misdemeanor* * * *. [Italics and parentheses supplied.]

The Congressional intent, it is submitted, is apparent in the language used; but if there were any doubt it must disappear in the light of the legislative history. The Congress clearly had in mind

the necessity for protection of insane veterans, and the law was intended as an aid to the courts in vouchsafing that protection.

In what more apt language could the prohibition have been expressed to show such intent? The same language has been used consistently in acts authorizing appropriated moneys to be paid direct to guardians. For example, observe Private Act No. 563, 74th Congress.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury is hereby authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, *to the legal guardian of Randall Krauss,* a minor, of Yakima, Washington, the sum of $60 per month until he attains the age of twenty-one, in full satisfaction of his claims against the United States for the death of his father, mother, and sister, who were killed when struck by a United States Army airplane which crashed at Griffith Park, California, on June 20, 1935: *Provided,* That payments hereunder shall begin on the first calendar day of the month following the approval of this Act: *Provided further,* That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to

> the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000. [Italics supplied.]

8. The decision of this Court in *Hines* v. *Stein* did not construe said Section 500 and does not govern the application thereof, but the case is controlled by the decision in *Ball* v. *Halsell,* and *Capital Trust Company* v. *Calhoun, supra.*

That this Court was not considering Section 500 in the Stein decision seems clear from the following language (298 U. S. 97):

> The petition for certiorari asserts that the objections to respondent's application to the Court of Common Pleas were based upon the President's Order of March 31, 1933 (Veterans' Regulation No. 10), permitted by sections 4 and 7 of the Act of March 20, 1933, c. 3, 48 Stat. 9; "Instructions" promulgated by the Administrator under authority of that Order; and sections 111, 114, and 115, Title 38, U. S. C. A.

Section 500 (Section 551, Title 38, U. S. C.) is self-executing (C. C. Appeals, 2nd, *Margolin case,* supra) and is dependent upon no Regulation or order. The language used in Section 500 differs from that of the pension acts, and is even more specific than that contained in the statutes construed in the *Ball* v. *Halsell, Capital Trust Company* v. *Calhoun,* and *Calhoun* v. *Massie cases,* supra. It does not require the Administrator to

determine and pay fees and expenses out of allowed benefits as does the pension acts, but absolutely forbids any fee in excess of $10. The Veterans' Administration would have no administrative responsibility, were it not for Section 21, World War Veterans' Act as amended requiring the Administrator to appear in the guardianship court and object to fees that are illegal or in excess of those allowed by law. In so doing, he is representing the insane veteran; and the situation as to litigation does not differ essentially from that which existed in the cases of *Conlon* v. *Adamski,* 77 Fed. (2d) 397, and *Purvis* v. *Walls,* 184 Ark. 887, wherein the attorneys sued the veterans (sane) on a contract for a fee and the defense, successfully interposed, was the limitation of Section 500. It is only to insure that the insane veteran under guardianship may have the same defense that he, if sane, could himself interpose.

Nor is the question of reasonableness of the fee (dehors the statute) believed determinative. True, this court called attention to the reasonableness of the fee in the *Stein case*, and the Supreme Court of California stressed the question of reasonableness of the fee in the *Copsey case, supra.* But the pension statutes permitted the rendering of the legal services in the *Stein case,* and the fee was little more than the attorney could have charged in strict accord with the statute for fees and expenses.

But Section 500 prohibits services except in the

preparation of the papers, and limits to $10 the fee therefor. *Margolin case,* supra. In the absence of statute, what is a reasonable fee? That it is a matter of opinion may be illustrated by the instant case and that of *In re Copsey,* 76 Pac. (2d) 691. In each case the attorneys prepared the papers, filed the claims, and procured the insurance to be paid without suit—the amount of insurance paid in each case being approximately $12,000. For such services the New York courts allowed the attorney his expenses and a fee of $1,500; the California Superior Court allowed a fee of $4,000—which, however, the Supreme Court of California said was unreasonably excessive. But the matter is not labored here; for if the State Court had any authority of law to allow any fee in excess of that stated in the Federal Statute then the decision of the State Appellate Court on that question would not be reviewable by this Court. And this would be true of the $4,000 fee (31% of the insurance received) allowed by the California Superior Court in the *Copsey case*—it would be true whether the fee be 1% or 100% of the insurance. It was to settle such matters that Congress enacted the fee limitation and the need for such limitation is illustrated by the two cases discussed. For if the $10 limitation is not controlling, neither is the 10% in event of a suit. Indeed, if successful in a suit in the Federal Court, it would pay an attorney not to ask for a 10% fee therein, but to go

into a State Probate Court and get a 20% or 30% fee. And if Section 500 be not controlling on all, he could lawfully procure a fee in the State Court whether successful or unsuccessful in getting the insurance paid. Section 500 must control, or the intent and purpose of the Congress be thwarted.

The amount of work involved is immaterial and the question of reasonableness of the fee academic. Legislation, not court action, is the remedy—if one be necessary. The attorney could secure a fee only under the contract alleged or on a quantum meruit. A contract for any fee in excess of $10 would have been illegal. *Purvis* v. *Walls,* 44 S. W. (2d) 353; *Conlon* v. *Adamski,* 77 Fed. (2d) 397; *Purvis* v. *United States,* 61 Fed. (2d) 992. If a court may not permit recovery on an illegal contract of a sane person, how may it validly allow the same result (i. e. fee in excess of that fixed by Statute) to be attained on a quantum meruit—or any other—basis in the case of an insane person! This court said in *Ball* v. *Halsell,* 161 U. S. 72:

> Ball cannot maintain this action upon the contract between him and Halsell; and he does not sue, and could not recover, upon a quantum meruit.

That is to say the contract for 50% was made illegal by the law, and the law prescribed the limit of any fee to be charged. In short, courts have no power to allow that which is unlawful or prohibited by law. *Capital Trust Company* v. *Calhoun,* 250 U. S. 208.

9. The contract, if construed contrary to Section 500, is clearly illegal and void.

The contract made by the guardian is clearly illegal unless construed—as it may be—in consonance with Section 500. That is, if suit in the Federal Court had been necessary, as probably was contemplated, then, in the event of success, the fee would have been "fixed by the court"—the Federal District Court—at not to exceed 10 per cent of the judgment as provided by said Section 500. Any other contract would be illegal as held by the 8th Circuit Court of Appeals in *Purvis* v. *United States,* 61 Fed. (2d) 992, and by the Court of Appeals, District of Columbia, in *Conlon* v. *Adamski,* 77 Fed. (2d) 397.

In the latter case the Court of Appeals (D. C.) said (77 Fed. (2d) 397):

> Appellant James Conlon and appellee Roman Adamski on September 11, 1933, entered into a contract in writing whereby appellee employed appellant as attorney to bring a mandamus proceeding in the Supreme Court of the District of Columbia to enforce the payment of a claim alleged to be due him upon a war risk insurance policy for the sum of $8,740. According to the contract, out of this claim, appellant was to be paid for his services in the sum of $2,500.
>
> Assuming, however, though by no means conceding, that section 3477, R. S. supra, is inapplicable to the present case, appellant's contention would not be improved, since he

comes in conflict with the provisions of Section 551, Title 38 U. S. C. (38 U. S. C. A., Section 551), which makes it a criminal offense under any circumstances "to solicit, contract for, charge, or receive, any fee or compensation" in excess of 10 per centum of the amount recovered in such a proceeding.

In the former the court (8th Circuit) declared (61 Fed. (2d) p. 998):

> The proposition urged that federal statutes cannot prescribe the qualifications of suitors in state courts is beside the point. Here there has been no attempt to do so. Appellant had an undoubted right to make a contract with the Walls for compensation for his services, and to sue thereon; but the amount of the compensation contracted for, or sued for, must not exceed the maximum allowed by the statute for the particular services rendered. The question is not one of appellant's right to make a contract, or to sue thereon—it is whether he attempted thereby to secure or receive a fee in excess of that allowed by Section 551, supra. If he did, then he has violated that statute.
>
> There is no reason why Congress, having created a plan of war risk insurance for the benefit of the soldiers, may not limit the compensation an attorney or agent may receive for assisting the beneficiary in securing benefits due him. Congress can impose such limitations in this connection as it may

deem desirable. If a contract for compensation for services rendered in securing payment of war risk insurance claims were a legitimate defense where an attorney is charged with soliciting or receiving fees prohibited by the statute, a large loophole would be opened for circumventing the statute by all manner of subterfuge.

Similarly with the statute involved in the instant case, there is no ambiguity, the language is clear and it was undoubtedly adopted by Congress to prevent the fleecing of beneficiaries under these war risk insurance certificates, and, if an attorney or agent is not willing to abide by the statute and run the risk of receiving only $10 as a fee for all work done in case suit is not brought, he is under no obligation to take the case. He cannot avoid the provisions of the act by any contract. *Lopez* v. *United States* (C. C. A.) 17 Fed. (2d) 462. The alleged contract in the instant case is no defense.

10. Section 500 establishes a general fee limitation in favor of an insane veteran which the court has no power to waive.

There is a further distinction between Section 500 and the Regulations and laws considered in the Stein case, in that Section 500, except in case of a judgment in a Federal District Court, does not confine prohibition of payment of the fee to benefits received under the act, but prohibits absolutely any fee in excess of $10 for services rendered the vet-

eran or on his behalf in connection with a claim whether successful or otherwise.

This phase of the statute was given extensive examination in a case which was decided by the Circuit Court of Appeals, 6th Circuit.

Welty v. *United States*, 2 Fed. (2d) 562

The decision in that case was solely on the point that defendant was entitled to an instruction as to the meaning of Section 13, War Risk Insurance Act (Section 500 here involved). The Circuit Court of Appeals reversed the lower court which had refused defendant's requested charge therein. The discussion therefore is mentioned here not as direct authority but as illustrative and because of its persuasive application to the instant case. Judge Mack stated the controverted facts as follows (p. 563):

> Franklin R. Strayer became insane only a few days after his arrival in camp. His father maintained him at a sanitarium, incurring heavy expenses. An application for compensation under the War Risk Insurance Act had been refused, on the ground that the condition did not arise while he was in the service. Defendant, who had been a congressman, was then applied to by the father. The conflict in the facts is whether he was to receive for his services, if successful in securing compensation under the act for Strayer and payment therefrom to the father for the expenses incurred by him on

> behalf of the son, one-third of the compensation so to be secured for the son, or whether his employment was solely by and on behalf of the father, and his payment to be made solely by the father, of one-third of such sum as might be allowed to the father because of the expenses incurred by him for his son, plus any expenses to which the defendant might be put in the matter.

After mentioning the view that the statute undoubtedly is within the constitutional power of Congress, and the belief that it did not cover a fee that might be paid gratuitously by a third person, the court stated (p. 563)—

> * * * the necessary construction of the statute under the rules governing penal acts is to limit the prohibition to payments to be made *by or out of the funds of the applicant and to dealings with him or on his behalf* * * * [Italics supplied.]

(At p. 564:)

> As we interpret the statute, it permits a charge of $3 to the applicant himself for services in the preparation and execution of the necessary papers, and prohibits any charge whatsoever to him for any additional services in the prosecution of the claim. Even though claim agents and attorneys are not to be recognized in the presentation or adjudication of claims, the rendering by them of services in the prosecution of the claims, gratuitously so far as the applicant is concerned, is not forbidden.

> The vital question in this case was whether or not the defendant indirectly solicited or received compensation out of the funds that belonged to the insane applicant, or whether his dealings were entirely with and on behalf of the father and his compensation to be paid solely out of anything that the father might justly recover from the estate of his son.
>
> If, as the government contends, the amount received was not made up of items of expenses actually incurred under agreement for reimbursement by the father out of his own funds, plus one-third of the balance of the father's fund, that fund being his just claim as allowed by the state court against the estate of his son for expenses actually incurred by him and services actually rendered by him to the son—if, in other words, these proceedings were more or less of a subterfuge intended to hide the actual transaction, and if the actual agreement, though made with the father, was made by him on behalf of his son, and was that the defendant should receive one-third of the amount allowed by the Government to the son—then the verdict would be just.

The court next referred to the exemption against the claims of creditors then contained in Section 28 War Risk Insurance Act—now Section 454, Title 38, U. S. C., and said (p. 564):

> This right of exemption was not asserted in the state court by the guardian who had no other property in the boy's estate; the at-

> tention of the probate judge apparently was not directed to the right of exemption; it may well be that if it had been called to his attention, he might, in view of the nature of the claim-moneys advanced for absolute necessities of life, have directed the guardian to waive it just as the soldier himself, if sane, could have waived it. If, however, defendant, Welty, with knowledge of this provision participated in any arrangement whereby the right of exemption was to be waived without knowledge or authority of the court and for the purpose of enabling a fund to be created from the compensation money out of which alone he was to be paid, the jury would be justified in finding therein an indirect and prohibited charge, and the later receipt of payment for services out of funds that belonged to the insane applicant.
>
> By no subterfuge can the prohibited payments be indirectly solicited or received; and while the judgment of the state court may be binding as between the parties thereto—if in fact it be but a step in the carrying out of the subterfuge—the judgment rendered therein affords no defense in this case.

But in the discussion quoted, the court failed to state a very significant and fundamental principle, viz, that a court, acting for a ward, can waive an exemption on his behalf (statute of limitations, fee limitation statute, or exemption from claims of creditors) only when to do so is for the benefit of the ward.

Ratcliffe, Guardian v. *Davis et al.*, 20 N. W., 763 (Sup. Ct. Iowa)

(At p. 763:)

> It is not necessary to set out all of the grounds for the demurrer. One of these is to the effect that it is not within the power of the guardian to waive the homestead rights of his ward.
>
> It is claimed by her guardian that because she is incapable of making her wishes known, that his preference shall be substituted for hers, and that he can waive the statutory provisions. We do not think he has any power to do so, because, as it appears to us, the right is a personal one, and if not exercised for any reason, even though it be her incapacity to do so, no other person can act in that behalf in her stead.
>
> It does not even appear from the averments of the petition that it would be to her interest, or the interest of her children, that the homestead should be waived.

Estes v. *Browning*, 60 Am. Dec. 238, (11 Tex. 237)

(At p. 241:)

> As a matter of policy, then, and as one very beneficial to estates, administrators are required to set up the statute in cases to which it applies. But this rule has no force in cases where its application would be detrimental, perhaps ruinous, to the estate.

To the same effect is *King* v. *Cassidy*, 36 Tex. 531. Indeed the court must recognize and refuse

to waive the exemption or limitation, contrary to the expressed wishes of the ward; if not for the best interests of the ward.

Alling v. *Alling*, 27 Atl. 655 (52 N. J. Eq. 92)

(At p. 656:)

> At the death of the husband, the widow and her infant child were substantially without means and the mother was obliged to work to earn a living for both. * * * Her demand against the daughter for her support, education, and maintenance amounts to over $12,000, or four-fifth's of the child's fortune; and yet the daughter, an intelligent young lady, frankly declared on the stand that she wished her mother to be paid in full. It is hardly necessary to say that this court cannot act upon such consent, but must defend the daughter, even against her own mother's claim, examine the demand, and see if it is lawful and proper to be countenanced and enforced by this court.
>
> * * * * * *
>
> The statute of limitations is binding on this court, as well as on the courts of law; and wherever a pecuniary demand will be barred at law it will be barred here, unless there is some circumstance in the case which renders it inequitable for the party entitled to its benefit to set it up. We have seen that this is a simple pecuniary demand, founded on a quantum meruit, and I am unable to find in the case any circumstances which renders it inequitable for this defendant to

set up the bar of the statute against her mother. *She is clearly entitled to the benefit of the plea, and it is the duty of this court, as her guardian, to plead it for her.* When she attains 21 years of age, she can do what she pleases with her money, but this court cannot permit her to give it away, even to her own mother. [Italics supplied.]

A fortiori, the probate court must invoke the fee limitation in favor of an insane veteran ward. *Hines* v. *Copsey*, 76 Pac. (2d) 691 (Adv.).

11. The theory of, and reasons for, the limitation of attorney fees in insurance and compensation cases are identical with those underlying the New York statute limiting such fees in Workmen's Compensation Cases.

The public policy established for this class of cases is in harmony with that of the State of New York, and other states, with respect to attorney fees in Workmen's Compensation Cases, for example (Sec. 24, Workman's Compensation Law, New York).

In re Fish, 177 N. Y. S. 338

One of the avowed reasons for the passage of the Workmen's Compensation Act was to insure as large a return to the injured workman in compensation for injuries incurred in the course of his employment as possible. It was realized that under the conditions theretofore prevailing the great majority of cases were taken by lawyers on

> contingent fees, and that from 33 to 50 per cent of the amounts recovered went to the attorneys, instead of to the workmen. Simplicity of procedure, rapidity and certainty in procuring payment, and receipt by the injured of the bulk of the award, instead of large payments therefrom for services in obtaining it, was the end looked to and accomplished by this remedial legislation.
>
> We do think, however, it is our duty to warn the profession that we regard such conduct, or the use of any means *which the wit of man may devise,* by which a larger amount of the recovery shall go to an attorney than that fixed by the commission, as improper, unethical, and deserving of disciplinary action. We think it clear that we ought to take this stand in support of this legislation and that hereafter we shall act upon such offenses accordingly. [Italics supplied.]

These reasons are more impelling than those stated by this court in the *Stein case;* and as shown have been so recognized by the Congress as well as state legislatures.

12. Finally, the veteran contracted for the protection of the Statute, and the court must give effect to the fee limitation as a part of the veteran's contract.

The contract which the veteran made with the United States entitled him to receive his insurance undiminished by attorney fees except in consonance

with the Act (Section 500). This Court has recognized that the contract of insurance consisted in the application filed by the soldier and the law and regulations pursuant to law, and that it was in all respects subject to the provisions of the law. *White* v. *United States,* 270 U. S. 175.

> The certificate of insurance provided in terms that it should be "subject in all respects to the provision of such Act (of 1917), of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the act, shall constitute the contract." These words must be taken to embrace changes in the law no less than changes in the regulations.

The veteran, even though now insane—we urge even more so—is entitled to the protection of his contract. This contract was binding on the committee, which as an arm of the court, acts for his ward and is bound by the law applicable to the ward. The court has power to act for the ward in some instances, but it cannot do that which the ward, if sui juris, could not legally do. And if it be argued that the veteran himself might with impunity pay his attorney an illegal fee, such liberty to ignore the law is not vouchsafed guardians with the approval of courts. As this Court significantly observed in *Hall* v. *Coppell,* 7 Wal.

542, "The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation." Approved in *Oscanyan* v. *Winchester Repeating Arms Co.*, 103 U. S. 261.

SUMMARY

(A) The United States has by statute (Sec. 500, World War Veterans' Act, Section 551, Title 38, U. S. C.) limited the fees which may be charged by any one in connection with a claim for war risk insurance.

(B) This limitation was intended to, and does, apply to guardianship cases in State courts, and is binding on said courts and on all agents and officers of the court.

(C) To hold otherwise would mean that a law of the United States, intended for the protection of *all* veterans, may, in effect, be so narrowed in its application, or abridged by judicial decision, as to deny an *insane* veteran that protection. It would challenge the constitutional power of Congress to provide for the common defense or in the exercise of such power to protect veterans, their beneficiaries, and dependents, in the full enjoyment of the benefits provided for them by a grateful government. It would be to hold that an insane veteran, supposedly under the protection of the probate court, may be deprived of the safeguard not only promised him by the Government he served, but

for which he contracted and paid; and would deny the efficacy of such contract.

(D) Under what is believed the proper construction of the statute, the judgment of the New York Court was contrary to the law.

CONCLUSION

It is respectfully submitted that, for the reasons stated, and upon the authorities cited herein, the judgment of the Supreme Court, Appellate Division, Second Department, State of New York, should be reversed with costs, but not against the estate of the insane veteran.

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FILE COPY

IN THE

Supreme Court of the United States

October Term, 1937.

No. [redacted] 24

FRANK T. HINES, Administrator of Veterans' Affairs, United States Veterans' Administration,

Petitioner,

v.

JAMES J. LOWREY, Committee of the Person and Estate of WILLIAM GARMES, an Incompetent Person,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York.

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

BENJAMIN C. RIBMAN,
JAMES J. RICHMAN,
LOUIS J. ALTKRUG,
Counsel for Respondent.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

INDEX.

CASES CITED.

STATUTE.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

IN THE MATTER

OF

The application of JAMES J. LOWREY, committee of the person and property of WILLIAM GARMES, incompetent, for an order authorizing him to pay a fee to counsel for legal services rendered the estate.

No. 945.

FRANK T. HINES, Administrator of Veterans' Affairs, United States Veterans' Administration, Petitioner,

v.

JAMES J. LOWREY, committee of the person and estate of WILLIAM GARMES, an incompetent person, Respondent.

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This memorandum is submitted in opposition to a petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department.

Proceedings Below.

The statement of the proceedings in the State Courts, which appears at pages 3-5 of the petition for a writ in this case, recites substantially the proceedings had in this matter through the Court of Appeals of the State of New York.

Question Involved.

The sole question involved is whether Section 500, World War Veterans' Act, Section 551, Title 38, U. S. C. A., places any restrictions on the power of a State Court to allow an attorney a reasonable fee for services rendered by him for the benefit of the estate of an incompetent veteran, the administration of which is vested exclusively in the said State Court.

James J. Richman, an attorney at law, was awarded a fee of $1,500 by the Supreme Court of the State of New York for services rendered by him on behalf of the estate of an incompetent veteran in connection with a claim for disability benefits arising under a policy of war risk insurance (R. 2-4). As a result of said services, the estate of the incompetent was increased by a recovery of fixed and contingent benefits amounting to a sum in excess of $31,000 (R. 66-67). The Supreme Court of the State of New York made an order (R. 2-4) confirming the report of an Official Referee recommending a fee of $1,500 for said services rendered by Mr. Richman. This order was unanimously affirmed by the Appellate Division of the Supreme Court (R. 81) and a motion for leave to appeal to the Court of Appeals was thereafter denied by said Appellate Division (R. 80). The Court of Appeals likewise denied said leave to appeal (R. 80).

Petitioner concedes that the question of the reasonableness of the fee is not an issue before this Court and is not reviewable by it (Petitioner's Brief, pp. 19, 23).

The reasonableness of the fee will be discussed only incidentally and in support of our contention that Congress did not restrict and never intended to restrict to $10 the fee which a State Court would be empowered to award for services rendered by an attorney on behalf of the estate of an incompetent veteran.

POINT I.

Congress, by enacting Section 500, World War Veterans' Act, did not place any limitations on the power of a State Court to allow reasonable fees for services rendered by an attorney for the benefit of the estate of an incompetent veteran. *Hines* v. *Stein*, 298 U. S. 94, is controlling.

The doctrine of *Hines* v. *Stein*, 298 U. S. 94, controls the decision in this case. The unanimous decision of this Court in that case requires the denial of the petition for a writ of certiorari here.

In the *Stein* case, the guardian of an incompetent veteran made an application to a Pennsylvania State Court for permission to pay an attorney out of the incompetent's funds a reasonable fee for legal services rendered by him and for expenses incurred in connection with the presentation before the Board of Veterans' Appeals at Washington, D. C. of a claim for pension or compensation. The Veterans' Administration did not question the reasonableness of the fee awarded by the Court, but contended that Congress, by enacting Sections 111, 114 and 115 of Title 38, U. S. C. A., had limited to $2 the fee which could be awarded to the attorney for rendering the services in question. This Court rejected petitioner's contention and said as follows (p. 97):

> "It is true that the provisions cited place general restrictions upon the fees of attorneys in connection with pension matters and prescribe the method of payment. But we find nothing in any of these Acts of Congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them. Conflict in respect of such matters between state courts and the federal government, its officers or bureaus, would be unseemly, perhaps extremely unfortunate. And in the absence of compelling language, we cannot conclude that there was intention to create a situation where this probably would occur. During many years, Congress has

recognized the propriety if not the necessity, of entrusting the custody and management of funds belonging to incompetent pensioners to fiduciaries appointed by state courts, without seeking to limit judicial power in respect of them. * * * Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to sanction the promulgation of rules to that end by executive officers or bureaus.

"The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries against extortion, imposition or fraud. Calhoun v. Massie, 253 U. S. 170, 173, 64 L. Ed. 842, 845, 40 S. Ct. 474. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought."

Sections 111, 114 and 115 of Title 38, U. S. C. A., which were involved in the *Stein* case, and Section 500, World War Veterans' Act, Section 551, Title 38, U. S. C. A., involved in the case at bar, are quoted in full in the appendix. The similarity between these statutes is apparent. We quote the pertinent portions thereof.

Section 500, World War Veterans' Act, involved in the case at bar, provides in part as follows:

"* * * payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed $10 in any one case: * * * Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment."

Section 111, Title 38, U. S. C. A., involved in the *Stein* case, provides in part as follows:

> "No agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding $25.00. * * *"

Section 114, Title 38, U. S. C. A., involved in the *Stein* case, provides in part as follows:

> "* * * In all cases where application is made for pension, and no agreement is filed with the commissioner as herein provided, the fee shall be $10 and no more. * * * No greater fee than $2 shall be demanded, received, or allowed in any claim for pension granted by special act of Congress, nor in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed. * * * Any agent or attorney or other person instrumental in prosecuting any claim for pension, who shall directly or indirectly contract for, demand or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or any agent, attorney, or other person instrumental in prosecuting any claim for increase of pension on account of the increase of disability for which pension was allowed, who shall directly or indirectly contract for, demand, receive or retain any compensation for such services, except as hereinbefore provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding $500 or imprisoned, not exceeding two years, or both, in the discretion of the Court."

Section 115, Title 38, U. S. C. A., involved in the *Stein* case, provides as follows:

> "The commissioner shall have power, subject to review by the Secretary, to reject or refuse to recognize

> any contract for fees, provided for in section 114 of this title, whenever it shall be made to appear that any undue advantage has been taken of the claimant in respect to such contract."

The petitioner recognizes the obvious similarity between these sections for in his petition for writ of certiorari in the *Stein* case he said (p. 12):

> "So far as material to this case, the effect of said Executive Orders (Regulations) and the Instructions issued by the Administrator of Veterans' Affairs pursuant thereto with respect to limiting the amount of the fee, is in substance the same as the provisions of Section 500 of the World War Veterans' Act, 1924 (43 Stat. 628, 38 U. S. Code 551), * * * and the pension statutes mentioned above."

Every argument which the petitioner is now urging against the payment of a reasonable fee to counsel was advanced in the *Stein* case and considered insufficient by this Court.

In the *Stein* case, as in the case at bar, petitioner urged that the fee limitation provisions of the pension acts were applicable to cases involving both competent and incompetent veterans, that Congress intended in enacting these statutes to protect all beneficiaries from extortion, imposition or fraud, and that such a broad purpose should be effectuated even in cases involving estates of incompetent veterans. In answer to that argument, this Court said at page 98:

> "The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries against extortion, imposition or fraud. Calhoun v. Massie, 253 U. S. 170, 173, 64 L. Ed. 843, 845, 40 S. Ct. 474. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought."

The Committee applied to the Supreme Court of the State of New York on notice to the petitioner for an order authorizing the payment of a reasonable fee to Mr. Richman for said professional services rendered by him to the estate of the incompetent veteran (R. 13-16). The Court referred the application to an Official Referee to take testimony and to report on the nature of the services rendered and the reasonable value thereof. A hearing was had before the Referee, again on notice to petitioner, who was represented throughout by counsel (R. 54-70). The report of the Official Referee (R. 70) was thereafter submitted for approval to the Special Term of the Supreme Court—again on notice to the petitioner—and was confirmed (R. 2-4). The Appellate Division of the Supreme Court, on petitioner's appeal, thereafter unanimously affirmed the order below (R. 81) and the Court of Appeals refused to review (R. 80). Certainly the Courts of the State of New York had ample opportunity to consider the reasonableness of the fee awarded to counsel and to fully protect the interests of the incompetent veteran.

This Court recognized the fact that if a State Court was restricted, as suggested by petitioner, to making an award of a fee of $2 to an attorney for the services rendered by him as set forth in the *Stein* case, the State Court would be hamstrung in its management of and control over the incompetent veteran's estate committed to its care. Such an interpretation would constitute an impeachment of the sovereignty of the State by invading the jurisdiction of its Courts and usurping their functions and prerogatives. The result of such a view would in effect deny to the incompetent veteran the right to be properly represented by capable counsel. Congress, as this Court indicated in the *Stein* case, had no intention of so doing.

There is but one point of difference between the *Stein* case and the case at bar, and that difference strengthens our contention—the *Stein* case involved a claim for pension, whereas the case at bar involves a claim under a policy of war risk insurance. The rule in the *Stein* case, applying as it does to a pension, a *gratuity* granted by the Government, should *a fortiori* be the rule applicable to a policy of war risk insur-

ance, a *contract*. *Lynch* v. *United States* (*Wilner* v. *United States*), 292 U. S. 571. Certainly if a purported federal statutory restriction on the amount of a fee in a *pension* matter, which involves a *gratuity*, cannot interfere with a State Court's power to direct the payment of a reasonable fee for legal services rendered to an incompetent's estate in a *pension* matter, a similar restriction in a statute relating to war risk insurance, which involves a *contract*, has no greater force or effect.

Section 500, World War Veterans' Act, applies both to war risk insurance and to compensation or pension, thus indicating that Congress intended that the fee limitation provisions in compensation and pension cases should be similarly applied in war risk insurance cases. This similarity, as we have heretofore pointed out, is admitted by petitioner (*supra*, p. 6).

The insured made a contract with the insurer. The *Stein* case establishes that Congress never intended that one of the terms of this contract should restrict a State Court from allowing a reasonable fee to an attorney for services rendered on behalf of an incompetent insured. Mr. Richman's dated retainer (R. 70) placed the determination of his fee in the hands of the Court having jurisdiction.

Hines v. *Stein*, we submit, is controlling, and the petition for a writ of certiorari should therefore be denied. This Court has passed on the issues which petitioner now seeks to raise in this case. There is no occasion for any further review.

POINT II.

Concerning the Authorities Cited by Petitioner.

We do not intend to discuss at length the cases cited by petitioner in his brief. Most of the authorities cited were called to this Court's attention in the *Stein* case in the petition for a writ of certiorari, or in the brief submitted by petitioner after the writ was granted, or in the petition for a rehearing. *Purvis* v. *United States*, 61 F. (2d) 992, *Lopez*

v. *United States*, 97 F. (2d) 462, and *Margolin* v. *United States*, 269 U. S. 93, cited by petitioner, do not involve incompetent veterans. To the extent that certain cases decided prior to the *Stein* case are inconsistent with the rule established therein, they must be disregarded.

The petitioner relies very heavily on the authority of *In re Shinberg*, 238 App. Div. 74, 263 N. Y. Supp. 354. This case was called to this Court's attention in the *Stein* case not only in the petition for a writ, but also in the brief submitted by petitioner after the writ was granted. In the case at bar, petitioner urged the binding force of the *Shinberg* case before all the Courts of the State of New York. Not only did the *Stein* case reject the holding of the *Shinberg* case, but the Courts of the State of New York in awarding the fee to Mr. Richman have deliberately overruled the authority of the *Shinberg* decision.

In the opinion in the *Shinberg* case, the Court gave expression to the view that "there may be cases where the enforcement of this statute will result in a hardship," thus recognizing the harshness of petitioner's position. Thereafter, and in the case of *In re Bylow's Estate*, 153 Misc. 890, the Surrogate of Queens County in the State of New York took occasion to comment upon the "distasteful" result which the Court felt compelled to apply in the *Shinberg* case and said at page 894 of the opinion:

> "An extreme illustration of the extent to which the courts will go in recognizing and enforcing the limitation may be found in Matter of Shinberg's Estate, 238 Appellate Division 74. The emphatic language of the statute there considered compelled the Court to reach a distasteful result."

In view of the decision in the *Stein* case, the Courts of the State of New York did not hesitate to reverse the ruling of the *Shinberg* case when the case at bar afforded them the opportunity.

A petition for a writ of certiorari has been filed by petitioner in *Hines* v. *Copsey*, No. 946, October Term, 1937. This case brings up for review a decision of the highest Court of the State of California and involves the identical problem

presented in this case. Petitioner seeks to draw comfort from the *Copsey* case, but we are at a loss to follow his reasoning. In the *Copsey* case, an attorney was awarded a fee of $4,000 by the Superior Court of the State of California for services rendered by him in connection with the prosecution of a claim for war risk insurance benefits on behalf of the estate of an incompetent veteran. The Veterans' Administration appealed to the Supreme Court of the State of California on the ground that the fee was contrary to the provisions of Section 500, World War Veterans' Act. The respondent filed a motion to dismiss the appeal urging that the decision of this Court in the *Stein* case was controlling and hence that there was no issue before the Court. The Supreme Court of the State of California refused to dismiss the appeal, holding that the incompetent being a ward of the Court, the reasonableness of the fee was an issue for the Court to consider. By so holding, the Court recognized the binding effect of the *Stein* case. The Supreme Court of California thereafter, after considering the appeal on the merits, held that the fee allowed by the Superior Court was unreasonable. The Court said:

> "For the guidance of the probate court in arriving at the proper fee to be allowed in the instant case, it may be appropriate to say that we are of the opinion that a fee which would be allowed to an attorney for a competent veteran if a suit had been brought as set out in Section 551, Title 38, U. S. C., is the maximum fee which may be allowed, and that probably a smaller fee would be more in accordance with the merits of the case." *In re Guardianship of Copsey's Estate,* 76 Pac. (2d) 691, at 695.

It thus is clear that the Supreme Court of the State of California recognizes that Section 551, Title 38, U. S. C. A., does not apply to attorney's fees for services rendered in connection with the estates of incompetent veterans, and that an attorney who renders such services is entitled to a reasonable fee. There is no uncertainty about the law in California. There is no conflict between the decisions of the California State Courts in the *Copsey* litigation and the decisions of the New York State Courts in the case at bar.

Petitioner in the case at bar is the petitioner before this Court in the *Copsey* case. That, we believe, disposes of the question of any alleged conflict between New York and California on this question.

The authorities relied on by petitioner furnish no basis for the granting of the petition for a writ of certiorari in this case.

POINT III.

The petitioner, the *insurer*, because of a conflict of interest, cannot adequately assert the rights of the *insured*. The payment of a reasonable fee is necessary in order to enable the insured to retain independent counsel.

When the Government issued policies of war risk insurance it entered the insurance business. In consideration of the payment of premiums, the Government agreed to pay benefits upon certain contingencies. Certainly, a contracting party to an agreement cannot be considered as a proper person to protect the interests of the other contracting party. That there is a conflict of interest in such a situation is clear. That such a conflict of interest necessarily prevents petitioner from protecting the interests of a holder of such a policy is apparent from what occurred in the case at bar.

Disability benefits under the policy of war risk insurance were paid to the estate of the incompetent for the first time 14 years after the policy required the petitioner so to do. During all of this period there was information available in petitioner's files which, if acted upon, would have resulted in the payment of disability benefits to the incompetent long before 1934, when payments were commenced. Petitioner, on two occasions, denied liability, claiming that the policy had lapsed on May 1, 1920 for non-payment of premium when in fact the policy had then matured (R. 7).

The Government does not recognize any affirmative obligation on its part to initiate a claim for benefits under such

policies. Independent counsel representing solely the interests of the insured is essential for the proper protection of the rights of the insured under the contract. However, the insured will be denied the right to be properly represented unless he is permitted to pay a reasonable fee to an attorney of his own selection.

In cases involving incompetent veterans, the task of counsel is unusually difficult. The incompetent is unable to cooperate with his attorney in the preparation and presentation of his claim. This places an added burden on the attorney.

In view of these considerations, certainly Congress never intended that $10 should be the maximum fee payable to an attorney who rendered services which resulted in the enrichment of the estate of an incompetent veteran by a sum in excess of $31,000 in fixed and contingent benefits.

CONCLUSION.

It is respectfully submitted that *Hines* v. *Stein*, 298 U. S. 94, decided by this Court on April 27, 1936, controls the decision in this case, and the petition for a writ of certiorari should therefore be denied.

Dated, New York, May 5, 1938.

Respectfully submitted,

BENJAMIN C. RIBMAN,
JAMES J. RICHMAN,
LOUIS J. ALTKRUG,
Counsel for Respondent.

APPENDIX.

Statutes.

SECTION 551, TITLE 38, U. S. C. A. (SECTION 500, WORLD WAR VETERANS' ACT).

Except in the event of legal proceedings under section 445 of this chapter, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Parts II, III, and IV of this chapter, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed $10 in any one case: Provided, however, That wherever a judgment or decree shall be rendered in an action brought pursuant to said section 445 of this chapter the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered, and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid. Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive, any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

SECTION 111, TITLE 38, U. S. C. A.

Compensation of agent or attorney. No agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding $25; nor shall such agent, attorney or other person demand or receive such compensation, in whole or in part, until such pension shall be allowed. In all claims allowed since June 20, 1878, where it shall appear to the satisfaction of the Commissioner of Pensions that the fee of $10, or any part thereof, has not been paid, he shall cause the same to be deducted from the pension, and pay the same to the recognized attorney.

SECTION 114, TITLE 38, U. S. C. A.

Same; agreement for fee filed; fee in case of failure to file; form; amount paid deducted from fee. The agent or attorney of record in the prosecution of the case may cause to be filed with the Commissioner of Pensions, articles of agreement, without additional cost to the claimant, setting forth the fee agreed upon by the parties which agreement shall be executed in the presence of and certified by some officer competent to administer oaths. In all cases where application is made for pension, and no agreement is filed with the commissioner as herein provided, the fee shall be $10 and no more. And such articles of agreement as may be filed with the Commissioner of Pensions are not authorized, nor will they be recognized except in claims for original pensions, claims for increases of pension on account of a new disability, in claims for restoration where a pensioner's name has been or may hereafter be dropped from the pension rolls on testimony taken by a special examiner, showing that the disability or the cause of death, on account of which the pension was allowed, did not originate in the line of duty, and in cases of dependent relatives whose names have been or may hereafter be, dropped from the rolls on like testimony, upon the ground of nondependence, and in such other cases of difficulty and trouble as the Commissioner of Pensions may see fit to recognize them. No greater fee than $2

shall be demanded, received, or allowed in any claim for pension granted by special act of Congress, nor in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed. No fee shall be demanded, received, or allowed in any claim for arrears of pension or arrears of increase of pension allowed by any act of Congress passed subsequent to the date of the allowance of the original claims in which such arrears of pension, or of increase of pension, may be allowed. The articles of agreement herein provided for shall be in substance as follows, to wit: * * *

And if in the adjudication of any claim for pension in which such articles of agreement have been, or may be, filed, it shall appear that the claimant had, prior to the execution thereof, paid to the attorney any sum for his services in such claim, and the amount so paid is not stipulated therein, then every such claim shall be adjudicated in the same manner as though no articles of agreement had been filed, deducting from the fee of $10 allowed by law such sum as claimant shall show that he has paid to his said attorney. Any agent or attorney or other person instrumental in prosecuting any claim for pension, who shall directly or indirectly contract for, demand or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or any agent, attorney, or other person instrumental in prosecuting any claim for increase of pension on account of the increase of disability for which such pension was allowed, who shall directly or indirectly contract for, demand, receive, or retain any compensation for such services, except as hereinbefore provided, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offense, be fined not exceeding $500 or imprisoned, not exceeding two years, or both, in the discretion of the court. (Articles of Agreement omitted.)

SECTION 115, TITLE 38, U. S. C. A.

Same; commissioner may reject contract for fees. The commissioner shall have power, subject to review by the Secretary, to reject or refuse to recognize any contract for fees, provided for in section 114 of this title, whenever it shall be made to appear that any undue advantage has been taken of the claimant in respect to such contract.

FILE COPY

No. 24.

Supreme Court of the United States

OCTOBER TERM, 1938.

FRANK T. HINES, ADMINISTRATOR OF VETERANS' AFFAIRS, United States Veterans' Administration,
Petitioner,

v.

JAMES J. LOWREY, Committee of the Person and Estate of William Garmes, an Incompetent Person,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York.

CERTIORARI GRANTED MAY 23, 1938.

RESPONDENT'S BRIEF.

WILLIAM DIKE REED,
Counsel for Respondent.

BENJAMIN C. RIBMAN,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 24.

In the Matter of the Application of James J. Lowrey, Committee of the Person and Property of William Garmes, incompetent, for an order authorizing him to pay a fee to counsel for legal services rendered the estate.

FRANK T. HINES, Administrator of Veterans' Affairs, United States Veterans' Administration,

Petitioner,

v.

JAMES J. LOWREY, Committee of the Person and Estate of William Garmes, an Incompetent Person,

Respondent.

BRIEF OF RESPONDENT.

Questions Involved.

1. Has Congress placed a restriction on the amount of a fee that may be awarded by a State Court to an attorney for services rendered on behalf of an incompetent?

2. Did Congress, in enacting Section 500, World War Veterans' Act, Section 551, Title 38, U. S. C., *intend* to restrict a State Court in this regard?

Statement of the Case.

James J. Richman, an attorney at law, was awarded a fee of $1,500 by the Supreme Court of the State of New York for services rendered by him on behalf of the estate of an incompetent veteran in connection with a claim for disability benefits arising under a policy of war risk insurance (R. 2-4). As a result of said legal services, the estate of the incompetent was awarded fixed benefits amounting to $15,840 and contingent benefits which will amount to $15,176, or a total of $31,016 (R. 66-67). The Supreme Court of the State of New York made an order confirming the report of an Official Referee recommending a fee of $1,500 for the services rendered by Mr. Richman (R. 2-4). This order was unanimously affirmed by the Appellate Division of the Supreme Court and a motion for leave to appeal to the Court of Appeals was thereafter denied by both the Appellate Division and by the Court of Appeals (R. 80-81).

At the time of the application by the committee of the incompetent to the New York Supreme Court for an allowance of a fee to his attorney, August 1st, 1936, the assets of the estate, other than those arising out of the war risk insurance recovery, amounted to about $5,000 (R. 7).

Petitioner concedes that the question of the reasonableness of the fee is not an issue before this Court and is not reviewable by it (Petitioner's Brief, p. 5).

Summary of Argument.

1. The Supreme Court of the State of New York has primary jurisdiction over the person and property of all incompetents within the State and there-

fore the act of Congress did not deprive the State Court of its jurisdiction to pass upon the reasonableness of the fee of an attorney in payment of services rendered for the benefit of an incompetent.

2. Congress, by enacting Section 500, World War Veterans' Act, did not place any limitations on the power of a State Court to allow reasonable fees for services rendered by an attorney for the benefit of the estate of an incompetent veteran.

Hines v. *Stein,* 298 U. S. 94 is controlling.

3. The authorities cited by the petitioner involve cases where Congress had the power to legislate with respect to the subject matters considered. They did not relate to subjects falling within the primary jurisdiction of the States.

4. The petitioner, the insurer, because of a conflict of interest cannot adequately protect the rights of the insured. The payment of a reasonable fee is necessary in order to enable the insured to retain independent counsel.

POINT I.

The power to regulate the fee of an attorney for services rendered to the estate of an incompetent rests primarily in the courts of the state having jurisdiction over his person and property.

When the English Chancellor exercised powers as general guardian over infants, idiots and lunatics this power was over and above the vast and extensive jurisdiction which he exercised in his judicial capacity in the Court of Chancery. This jurisdiction did not belong to the Court of Chancery as a Court of Equity but in exercising it the Chancellor was administering the prerogative and duty of the crown as *parens patriae*.

Article III, Section 2, of the Federal Constitution, which sets forth the judicial power of the Federal Government, does not embrace the powers which the King as *parens patriae* in England exercised through the Chancellor. These powers of prerogative have never been delegated by the people to the Federal Government and they remain with the States to be regulated and controlled by the State legislatures.

This doctrine is clearly elucidated in the case of *Fontain* v. *Ravenel*, 17 How. 369, 384, 392. Mr. Justice McLean, delivering the opinion of the Court, at page 384, said, that:

> "* * * when this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to

us by legislative enactment. The State as a sovereign, is the *parens patriae.*"

Hoadly v. *Chase,* 126 Fed. 818, 820.

In *Mormon Church* v. *United States,* 136 U. S. 1, at page 57, the Court says:

"This prerogative of *parens patriae* is inherent in the supreme power of every state, * * *"

In *United States* v. *Jackson,* 16 F. Supp. 126, the Court, relying on the foregoing authority, said at page 129:

"It is fundamental that the state is *parens patriae* of the insane."

The States never surrendered to the Federal Government their powers of prerogative over the affairs of the insane. The petitioner does not refer us to any provision in the Federal Constitution indicating any delegation by the states to the United States of power and control over the person and property of incompetents within their jurisdiction. On the contrary, the States have jealously retained this prerogative over their incompetents. In the State of New York, an elaborate system has been established by the legislature for the control of the person and property of incompetents:

N. Y. State Const. Art. VI, Sec. I;
New York Civil Practice Act, Arts. 81, 81-A;
Sporza v. *German Savings Bank,* 192 N. Y. 8.

Even if Congress had intended or had expressed its intention of assisting and advising the State Courts charged with the duty of administering the estates and

property of incompetents in regard to the fee that could be paid for services rendered by an attorney, such intention did not go to the extent of depriving the State Court of jurisdiction to pass upon the reasonableness of the fee. The Constitution of the United States does not confer upon Congress the right to exercise any of the States' powers encompassed within the prerogative of *"parens patriae"* over incompetents. Such a power is primarily within the jurisdiction of the States.

POINT II.

By enacting Section 500, World War Veterans' Act, Congress did not place any limitations on the power of a State Court to allow reasonable fees for services rendered by an attorney for the benefit of the estate of an incompetent veteran.

The doctrine of *Hines* v. *Stein,* 298 U. S. 94, controls the decision in this case. Congress in enacting Section 500, never intended to restrict a State Court in the exercise of its power to allow a reasonable fee to an attorney for services rendered in behalf of an incompetent veteran in a war risk insurance matter.

In the *Stein* case, the guardian of an incompetent veteran made an application to a Pennsylvania State Court for permission to pay an attorney a reasonable fee for legal services rendered by him and for expenses incurred in connection with the presentation before the Board of Veterans' Appeals at Washington, D. C. of a claim for pension or compensation. The Veterans' Administration did not question the reasonableness of the fee awarded by the Court, but contended that Congress, by enacting Sections 111, 114 and 115 of Title 38, U. S. C. A., had limited to $2

the fee which could be awarded to the attorney for rendering the services in question.

This Court rejected the petitioner's contention in the case of *Hines* v. *Stein,* 298 U. S. 94, and Judge McReynolds, in writing the unanimous opinion of the Court, there said at page 97:

> "It is true that the provisions cited place general restrictions upon the fees of attorneys in connection with pension matters and prescribe the method of payment. But we find nothing in any of these Acts of Congress which definitely undertakes to put limitation upon state courts in respect of guardians or to permit any executive officer, by rule or otherwise, to disregard and set at naught orders by courts to guardians appointed by them. Conflict in respect of such matters between state courts and the federal government, its officers or bureaus, would be unseemly, perhaps extremely unfortunate. And in the absence of compelling language, we cannot conclude that there was intention to create a situation where this probably would occur.
>
> "During many years, Congress has recognized the propriety if not the necessity, of entrusting the custody and management of funds belonging to incompetent pensioners to fiduciaries appointed by state courts, without seeking to limit judicial power in respect of them. * * *
>
> "Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to sanction the promulgation of rules to that end by executive officers or bureaus.
>
> "The broad purpose of regulations in respect of fees of those concerned with pension matters is to protect the United States and beneficiaries

> against extortion, imposition or fraud. *Calhoun* v. *Massie*, 253 U. S. 170, 173, 64 L. Ed. 843, 845, 40 S. Ct. 474. Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with pension funds. The purpose in view is for consideration when the true meaning of statute or rule is sought."

Sections 111, 114 and 115 of Title 38, U. S. C. A., which were involved in the *Stein* case, are similar to Section 500, World War Veterans' Act, Section 551, Title 38, U. S. C. A., involved in the case at bar. The rule of the *Stein* case, applicable to Sections 111, 114 and 115, applies with equal force to Section 500 involved in the case at bar.

The petitioner recognizes the obvious similarity between these sections. In his petition for writ of certiorari in the *Stein* case he said (p. 12):

> "So far as material to this case, the effect of said Executive Orders (Regulations) and the Instructions issued by the Administrator of Veterans' Affairs pursuant thereto with respect to limiting the amount of the fee, is in substance the same as the provisions of Section 500 of the World War Veterans' Act, 1924 (43 Stat. 628, 38 U. S. Code 551), * * * and the pension statutes mentioned above."

Every argument which the petitioner is now urging against the payment of a reasonable fee to counsel was advanced in the *Stein* case and was considered insufficient by this Court.

In the *Stein* case, as in the case at bar, petitioner urged that the fee limitation provisions of the pen-

sion acts were applicable to cases involving both competent and incompetent veterans, that Congress intended in enacting these statutes to protect all beneficiaries from extortion, imposition or fraud and that such a broad purpose should be effectuated even in cases involving estates of incompetent veterans. In answer to that argument, this Court said at page 98:

> "Dangers of this character are not to be expected in connection with the orderly exercise of authority by state courts over appointees properly entrusted with pension funds."

The Committee of the Person and Estate of William Garmes, an Incompetent Person, the respondent herein, applied to the Supreme Court of the State of New York on notice to the petitioner for an order authorizing the payment of a reasonable fee to James J. Richman, Esq., for said professional services rendered by him to the estate of the incompetent veteran (R. 13-16). The Court referred the application to an Official Referee to take testimony and to report on the nature of the services rendered and the reasonable value thereof. A hearing was had before the Referee, again on notice to petitioner, who was represented throughout by counsel (R. 54-70). The report of the Official Referee (R. 70) was thereafter submitted for approval to the Special Term of the Supreme Court—again on notice to the petitioner—and it was confirmed (R. 2-4).

The Appellate Division of the Supreme Court, on petitioner's appeal, thereafter unanimously affirmed the order entered in Special Term and the Court of Appeals refused to review (R. 80, 81). Certainly the Courts of the State of New York had ample opportunity to consider the reasonableness of the fee.

awarded to counsel and to fully protect the interests of the incompetent veteran.

The Legislature of the State of New York, at the request of the petitioner, adopted the Uniform Veterans' Guardianship Act (Article 81-A of the New York Civil Practice Act) for the very purpose of protecting the estate of incompetent veterans from unreasonable claims. The petitioner does not contend that the statute in question is at all inadequate for such purpose.

This Court recognized the fact that if a State Court were restricted to awarding a fee of $2 to an attorney for the services such as were rendered in the *Stein* case, the State Court would to this extent be precluded in its management of and control over the incompetent veteran's estate committed to its care. Such an interpretation would constitute an invasion of the sovereignty of the State by limiting the jurisdiction of its Courts and usurping this function and prerogative. The result of such restriction would in effect deny to the incompetent veteran the right to be properly represented by capable counsel. Congress, as this Court indicated in the *Stein* case, had no intention of so doing. Such intention must be expressed in clear and unequivocal language.

United States v. *Crittenden*, 24 F. Supp. 84.

There is but one point of difference between the *Stein* case and the case at bar, and that difference strengthens our contention—the *Stein* case involved a claim for pension, whereas the case at bar involves a claim under a policy of war risk insurance. The rule in the *Stein* case, applying as it does to a pension, a gratuity granted by the Government, should

therefore be the rule applicable to a policy of war risk insurance, a *contract*.

Lynch v. *United States*, 292 U. S. 571.

Certainly if a purported federal statutory restriction on the amount of a fee in a *pension* matter, which involves a *gratuity*, does not entitle the petitioner to interfere with a State Court's power to fix the amount of the payment of a reasonable fee for legal services rendered to an incompetent's estate, a similar restriction in a statute relating to war risk insurance, which involves a *contract*, has no greater force or effect.

The insured made a contract with the insurer. The *Stein* case establishes that Congress never intended that one of the terms of this contract would restrict a State Court from allowing a reasonable fee to an attorney for services rendered on behalf of an insured incompetent veteran. Mr. Richman's retainer was made subject expressly to the control of the Court which had charge of the affairs of the incompetent (R. 70).

Hines v. *Stein*, we submit, is controlling, and the order should be affirmed.

POINT III.

Concerning the authorities cited by petitioner.

The petitioner has cited many authorities which were called to this Court's attention in the *Stein* case. The cases of *Purvis* v. *United States*, 61 F. (2d) 992, and *Margolin* v. *United States*, 269 U. S. 93, cited by petitioner, do not involve incompetent veterans. Those cases which were decided prior to the *Stein* case and

are inconsistent with the rule established therein must be disregarded.

The cases of *Ball* v. *Halsell*, 161 U. S. 72, *Capital Trust* v. *Calhoun*, 250 U. S. 208 and *Calhoun* v. *Massie*, 253 U. S. 170 all involved the right of Congress to restrict fees in cases of claims asserted against the Government arising out of Indian affairs and in cases of claims for damages for property taken by the United States during the Civil War. With respect to all of these matters, Congress had the power to legislate. None of them involved an attempt by Congress to legislate with regard to the management of the estate of an incompetent, over which the States have jurisdiction as *parens patriae*.

These authorities, therefore, are not controlling and were not considered binding when called to the attention of this Court in *Hines* v. *Stein*.

In the case at bar, petitioner urged the binding force of *In re Shinberg*, 238 App. Div. 74, 263 N. Y. Supp. 354, before all the Courts of the State of New York. Not only did the decision in the *Stein* case reject the holding of the *Shinberg* case, but the Courts of the State of New York, in awarding the fee to the attorney, have deliberately overruled the authority of the *Shinberg* decision.

In the opinion in the *Shinberg* case, the Court gave expression to the view that "there may be cases where the enforcement of this statute will result in a hardship," thus recognizing the harshness of petitioner's contention. Thereafter in the case of *In re Bylow's Estate*, 153 Misc. 890, the Surrogate of Queens County in the State of New York took occasion to

comment upon the "distasteful" result which the Court felt compelled to reach in the *Shinberg* case and said at page 894 of the opinion:

> "An extreme illustration of the extent to which the courts will go in recognizing and enforcing the limitation may be found in ***Matter of Shinberg's Estate,*** 238 Appellate Division 74. The emphatic language of the statute there considered compelled the Court to reach a distasteful result."

After the decision in the *Stein* case, the Courts of the State of New York did not hesitate to reverse the ruling of the *Shinberg* case when the case at bar afforded them the opportunity.

A petition for a writ of certiorari was filed by petitioner in *Hines* v. *Copsey;* No. 946, October Term, 1937, but the writ was denied, there being no final judgment. The petitioner sought to bring up for review a decision of the highest Court of the State of California involving the identical problem presented in this case. In the *Copsey* case, the petitioner appealed to the Supreme Court of the State of California on the ground that the fee of an attorney should be limited to $10 under the provisions of Section 500, World War Veterans' Act. The guardian filed a motion to dismiss the appeal urging that the decision of this Court in the *Stein* case was controlling and hence that there was no issue before the Appellate Tribunal. The Supreme Court of the State of California refused to dismiss the appeal, holding that the incompetent, being a ward of the Court, the reasonableness of the fee was a matter properly before the State Court, *In re Copsey,* 60 Pac. (2d) 121. The

Court later, in considering the appeal on the merits said:

> "For the guidance of the probate court in arriving at the proper fee to be allowed in the instant case, it may be appropriate to say that we are of the opinion that a fee which would be allowed to an attorney for a competent veteran if a suit had been brought as set out in Section 551, Title 38, U. S. C., is the maximum fee which may be allowed, and that probably a smaller fee would be more in accordance with the merits of the case." *In re Guardianship of Copsey's Estate,* 76 Pac. (2d) 691, at 695.

It thus is clear that the Supreme Court of the State of California recognizes that Section 551, Title 38, U. S. C. A., does not apply to attorney's fees for services rendered in connection with the estates of incompetent veterans, and that an attorney who renders such services is entitled to a reasonable fee, the amount of which shall be regulated by the State Court. There is no uncertainty about the law in California on this subject.

POINT IV.

The petitioner, the *insurer*, because of a conflict of interest, cannot adequately protect the rights of the *insured*. The payment of a reasonable fee is necessary in order to enable the insured to retain independent counsel.

When the Government issued policies of war risk insurance it entered the insurance business. In consideration of the payment of premiums, the Government agreed to pay benefits upon certain contingen-

cies. Certainly, a contracting party to an agreement cannot be considered as a proper person to protect the interests of the other contracting party. That there is a conflict of interest in such a situation is clear. That such a conflict of interest necessarily prevents petitioner from protecting the interests of a holder of such a policy is apparent from what occurred in the case at bar.

Disability benefits under the policy of war risk insurance were paid to the estate of the incompetent for the first time 14 years after the policy required the petitioner so to do. During all of this period there was information available in petitioner's files which, if acted upon, would have resulted in the payment of disability benefits to the incompetent long before 1934, when payments were commenced. Petitioner, on two occasions, denied liability, claiming that the policy had lapsed on May 1, 1920 for nonpayment of premium, when in fact the policy had then matured (R. 7).

The Government does not recognize any affirmative obligation on its part to initiate a claim for benefits under such policies. Independent counsel, representing solely the interests of the insured, are essential for the proper protection of the rights of the insured under the contract. The insured will be denied the right to be properly represented by an attorney of his own selection unless he is permitted to pay such attorney a reasonable fee.

In cases involving incompetent veterans, the task of counsel is unusually difficult. The incompetent is unable to cooperate with his attorney in the preparation and presentation of his claim. This places an added burden on the attorney.

The assets of the estate in this case, other than those arising out of the war risk insurance recovery, were more than sufficient to pay the fee fixed by the Supreme Court of the State of New York (R. 7).

In view of these considerations, certainly Congress never intended that $10 should be the maximum fee payable to an attorney who rendered services which resulted in the enrichment of the estate of an incompetent veteran by a sum in excess of $31,000 in fixed and contingent benefits.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the judgment of the Appellate Division of the Supreme Court of the State of New York for the Second Department should be affirmed.

Dated, New York, N. Y., October 6th, 1938.

Respectfully submitted,

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BENJAMIN C. RIBMAN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 24.—October Term, 1938.

Frank T. Hines, Administrator of Veterans' Affairs, United States Veterans' Administration, Petitioner,
vs.
James J. Lowrey, Committee of the Person and Estate of William Garmes, an Incompetent Person.

On Writ of Certiorari to the Supreme Court of the State of New York.

[November 7, 1938.]

Mr. Justice Black delivered the opinion of the Court.

Section 500 of the World War Veterans' Act[1] (as applicable here) prohibits the recognition of attorneys or claim agents in the presentation or adjudication of veterans' War Risk Insurance claims; limits to ten dollars the payment for assisting in the preparation and execution of an application to the Veterans' Bureau; permits a court—rendering a favorable judgment or decree on a veteran's claim—to allow the veteran's attorney a fee not to ex-

[1] Amount permitted to be paid agents or attorneys; solicitation, etc., of unauthorized fees or compensation; punishment. Except in the event of legal proceedings under Section 19, Title I of this Act, no claim agent or attorney except the recognized representatives of the American Red Cross, the American Legion, the Disabled American Veterans, and Veterans of Foreign Wars, and such other organizations as shall be approved by the director shall be recognized in the presentation or adjudication of claims under Parts II, III, and IV, of this Act, and payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers in any application to the bureau shall not exceed $10 in any one case: *Provided, however*, That wherever a judgment or decree shall be rendered in an action brought pursuant to Section 19 of Title I of this Act, the court, as a part of its judgment or decree, shall determine and allow reasonable fees for the attorneys of the successful party or parties and apportion same if proper, said fees not to exceed 10 per centum of the amount recovered, and to be paid by the bureau out of the payments to be made under the judgment or decree at a rate not exceeding one-tenth of each of such payments until paid. Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive, any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine or not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment. 43 Stat. 628, as amended 43 Stat. 1311, c. 10, 38 U. S. C. 551.

ceed ten per cent of the amount recovered; and makes soliciting or obtaining any fee greater than the statute provides a crime subject to a maximum punishment of a $500 fine and two years imprisonment.

A committee (guardian appointed by a New York state court) for an insane veteran retained an attorney to prosecute the rights of the incompetent on a War Risk Insurance contract. The New York court was petitioned for an attorney's fee of $3,000. Upon hearing, it appeared that the attorney had performed services of an investigational and preparatory nature in the prosecution of the veteran's claim; that contrary to Section 500, he had been recognized by the Bureau and permitted to join with a representative of the Disabled War Veterans in presenting the claim to the Bureau; and that subsequently, but without litigation, judicial decree or judgment against the government, the government paid the guardian an amount in excess of $10,000 on the claim. The New York court allowed a fee of $1,500 for the attorney's services, over the objection of the Administrator of Veterans' Affairs who intervened and insisted that Section 500 prohibited any fee in excess of $10 in this case.[2] We can assume, in the consideration of questions here presented, that valuable services were rendered by the attorney.

Respondent seeks to sustain the $1,500 fee upon the theory that the general power of the New York court to fix fees for services rendered an incompetent under that court's jurisdiction is not subject to the limitation of $10 for fees as provided in Section 500. He urges that the present case is controlled by the decision in *Hines* v. *Stein*, 298 U. S. 94. In that case, the Court said, "Nothing brought to our attention would justify the view that Congress intended to deprive state courts of their usual authority over fiduciaries, or to sanction the promulgation of rules to that end by executive offices or bureaus." This language did not refer to Section 500, which we now consider, but was a construction and interpretation of rules promulgated by the Administrator of Veterans' Affairs under authority of §§ 4 and 7 of an Act of March 20, 1933, c. 3, 48 Stat. 9, which rules were traceable to §§ 111, 114 and

[2] The Administrator appealed and the Appellate Division affirmed. 300 N. Y. S. 603. The Court of Appeals of New York denied the Administrator's motion for leave to appeal. 300 N. Y. 6. 1944. This Court granted certiorari, — U. S. —.

13 N.E. 2d 478.

115, Title 38, U. S. C. These Code Sections are based upon an Act passed in 1884.

Obviously, the interpretation given rules promulgated in furtherance of a line of legislation dating from 1884 cannot be accepted as controlling in determining the intent and effect of a separate and distinct act (Section 500) differing in form, substance and historical background. The rules and statutes construed in *Hines v. Stein, supra*, have no bearing on this case, which must be determined by the application of Section 500.

Section 500 is one in a series of congressional efforts to limit fees of claim agents and attorneys in the prosecution of veterans' insurance and related claims. Shortly after the United States entered the World War, Congress provided a comprehensive statutory plan of War Risk Insurance for soldiers and sailors.[3] Section 13 of that statute contained this provision: "The Director shall adopt reasonable and proper rules . . . . , to regulate the matter of the compensation, if any, but in no case to exceed ten per centum, to be paid to claim agents and attorneys for services in connection with" collection of soldiers' and sailors' benefits.

May 20, 1918, Congress amended Section 13 of the 1917 Act.[4] The House report shows that this amendment was strongly urged by the Secretary of the Treasury, then administering the World War Veterans' Act.[5] The 1918 amendment is substantially the same as Section 500, and in a case involving the meaning of that amendment this Court said, "Petitioner claims that the inhibition against receiving any sum greater than three dollars [ten dollars under Section 500] relates solely to the clerical work of filling out the form or affidavit of claim, and *does not apply to useful investigation and preparatory work such as he did*. . . .

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[3] c. 105, 40 Stat. 398 (October, 1917).

[4] c. 77, 40 Stat. 555.

[5] House Report No. 471 from the Committee on Interstate and Foreign Commerce, 65th Cong., 2nd Session. A part of the letter of the Secretary of the Treasury contained in the Report was as follows: "The evils of the situation are pressing. Unscrupulous attorneys and claim agents are circularizing prospective claimants . . . . The heartlessness and rapacity of these persons knows no bounds. In some instances their breakneck rush for employment has led them to the length of crucifying the wives and mothers of those in the service by false announcements that their husbands or sons have already fallen, and in almost all cases they are seeking to mulch the unwary out of hundreds of dollars for services that are either entirely unnecessary or would be amply remunerated by a nomipal fee." The discussions of the amendment in the House by those in charge of the bill were of the same tenor. Congressional Record, Vol. 56, Part 6, 5220-5226.

"We find no reason which would justify disregard of the plain language of the section under consideration. It declares that any person who receives a fee or compensation in respect of a claim under the Act except as therein provided shall be deemed guilty of a misdemeanor. *The only compensation which it permits a claim agent or attorney to receive where no legal proceeding has been commenced is three dollars for assistance in preparation and execution of necessary papers.* And the history of the enactment indicates plainly enough that Congress did not fail to choose apt language to express its purpose."[6] (Italics supplied.)

In 1926, Congress enacted additional legislation for the specific protection of incompetent veterans from illegal or excessive fees where guardians had been appointed by any court—State or Federal.[7] Congress declared that "whenever it appears that any guardian, curator, conservator or other person, in the opinion of the Administrator, is not properly executing or has not properly executed the duties of his trust or has collected or paid, or is attempting to collect or pay, fees, commissions or allowances that are inequitable or *in excess of those allowed by law for the duties performed* . . . , then and in that event the Administrator is empowered by his duly authorized attorney to appear *in the court which has appointed such fiduciary*, . . . and make proper presentation of such matters. . . ."[8] (Italics supplied.)

The history of Section 500 manifests beyond doubt the clear establishment of a public policy against the payment of fees for prosecution of veterans' claims in excess of those fixed by statute. Collection of a greater fee than that fixed in the statute is made a crime, and this Court has sustained a conviction under the statute.[9] Contracts for the collection of fees in excess of valid statutory limitations and for services validly prohibited by statute cannot stand, whether made with a competent veteran or the guardian of an incompetent veteran. Nor can any court having jurisdiction over an incompetent award a fee in violation of a valid statute. Congress

[6] Margolin v. United States, 269 U. S. 93, 101, 102.

[7] c. 723, 44 Stat. 792; c. 10, 38 U. S. C. 450.

[8] In 1935, Congress added the proviso that " . . . the Administrator is authorized and empowered to appear or intervene by his duly authorized attorney in any court as an interested party in any litigation instituted by himself or otherwise, directly affecting money paid to such fiduciary [guardian] under this section." c. 510, 49 Stat. 607.

[9] Margolin v. United States, *supra*.

clearly intended to protect all veterans, competent and incompetent, in all courts, State and Federal, against the imposition or payment of fees in excess of the amount fixed by statute. In furtherance of this policy the Administrator of Veterans' Affairs was charged with the express duty of appearing in all courts where it appears that "any guardian . . . . or other person . . . . is attempting to collect fees . . . in excess of those allowed by law." The progressive strengthening of this particular legislative policy precludes any probability that Congress intended to exempt mental incompetents from its protection, and Congress alone is vested with constitutional power to determine the wisdom of this policy.

Congressional enactments in pursuance of constitutional authority are the supreme law of the land. Section 500 is a valid exercise of congressional power.[10] "The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are."[11]

No court has rendered a judgment or decree in favor of the incompetent veteran and against the government, in which the court as a part of its decree determined and allowed a reasonable fee for the attorney of the veteran. In the absence of such a judgment and decree an attorney's fee of more than $10 is contrary to the controlling congressional enactment. The judgment below being for more than this amount is unauthorized and the cause is

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[10] Margolin v. United States, *supra*; Calhoun v. Massie, 253 U. S. 170.
[11] Claflin v. Houseman, 93 U. S. 130, 136.